Affidavit of Patrick Macklem
Sworn DEC 12/14

CANADIAN UNION OF PUBLIC EMPLOYEES, Locals 835, 1933, 2431, 2525, 4150
NOVA SCOTIA GOVERNMENT AND GENERAL EMPLOYEES UNION
NOVA SCOTIA NURSES UNION
UNIFOR, Locals 4600, 4603 and 4606

UNIONS

SOUTH SHORE DISTRICT HEALTH AUTHORITY
SOUTH WEST DISTRICT HEALTH AUTHORITY
ANNAPOLIS VALLEY DISTRICT HEALTH AUTHORITY
COLCHESTER EAST HANTS HEALTH AUTHORITY
CUMBERLAND HEALTH AUTHORITY
PICTOU COUNTY HEALTH AUTHORITY
GUYSBOROUGH ANTIGONISH-STRAIT HEALTH AUTHORITY
CAPE BRETON HEALTH AUTHORITY
CAPITAL HEALTH AUTHORITY
IZAAK WALTON KILLAM HEALTH CENTRE

EMPLOYERS

ATTORNEY GENERAL OF NOVA SCOTIA

ATTORNEY GENERAL

AFFIDAVIT

I, Patrick Macklem, William C. Graham Professor of Law, University of Toronto, of 78 Queens Park, Toronto, Canada, MAKE OATH AND SAY AS FOLLOWS:

1. I have personal knowledge of the facts and matters to which I depose in this Affidavit, except when such knowledge is stated to be on the basis of information and belief, in which case I do verily believe the information to be true.

2. I am the William C. Graham Professor of Law, at the Faculty of Law, University of Toronto, a member of the Law Society of Upper Canada, and a Fellow of the Royal Society of Canada. Prior to joining the Faculty, I was a law clerk for Brian Dickson, Chief Justice of Canada, in 1987. I first joined the Faculty of Law as an Assistant Professor in 1988, received tenure and was promoted to Associate Professor in 1993, was promoted to Full Professor in 1999, and was awarded the William C. Graham Chair in 2006. I write and teach in the areas of International Law, International Human Rights Law, Labour Law (domestic and international), and Constitutional Law (domestic and comparative).

3. I have authored numerous articles addressing international human rights law, labour law, labour policy and constitutional law. I have also authored, edited or co-edited several books, including *The Sovereignty of Human Rights* (New York: Oxford University Press, forthcoming); *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal Rights* (Toronto: University of Toronto Press, forthcoming); *Canadian Constitutional Law* (Toronto: Emond Montgomery, 2010); *Labour and Employment Law* (Toronto: Irwin Law, 2004); *The Security of Freedom* (Toronto: University of Toronto Press, 2001); and *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

4. My expertise in the areas of International Law, International Human Rights Law, Labour Law (domestic and international) and Constitutional Law (domestic and comparative) was previously recognized by the Saskatchewan Court of Queen's Bench in its decision in the case *The Saskatchewan Federation of Labour*, 2012 SKQB 62.

5. I was asked by the law firm of Plaxton & Company to express my opinion on the following three questions:

   (a) What role does international law play in judicial interpretation of the Constitution of Canada?

   (b) What role does international human rights law play in judicial interpretation of s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

   (c) What is the status of the right to establish and join an organization as an incident of freedom of association in international law, and to what extent do legislative provisions imposing restrictions on the right to establish and join an organization such as those set out in s. 89(1) and related provisions of the *Health Authorities Act,* S.N.S. 2014, c. 32 violate freedom of association as guaranteed in international law?

6. My opinion on these questions is attached as Exhibit 'A' to this affidavit.

7. My curriculum vitae is attached as Exhibit 'B' to my affidavit.

SWORN BEFORE ME at the)
City of Toronto, in the Province of Ontario)
this 12th day of December 2014.)
)
)
)

A Notary Public in and of
the Province of Ontario

Patrick Macklem

"EXHIBIT A"

Expert Opinion
Patrick Macklem
William C. Graham Professor of Law
University of Toronto

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1. The following is my opinion on international legal developments concerning freedom of association and the right of workers to establish and join organizations of their own choosing as they bear on transitional provisions in Nova Scotia's *Health Authorities Act,* S.N.S. 2014, c. 32 ("the *Act*").

I. Context of these proceedings

2. My understanding of these proceedings is as follows.

3. There are nine health districts plus the Isaac Walton Killam Health Centre ("IWK"). The IWK is a children's hospital located in Halifax. The Capital District Health Authority ("CDHA") is the largest health district, is located in the Halifax area, and contains several large health facilities that serve the entire maritime region. The remaining nine health authorities are primarily rural health authorities with smaller employee bases.

4. The NSGEU represents almost all of the employees in the CDHA and IWK. The NSGEU also represents public health and addiction service employees in the rural areas, and clerical employees in three smaller rural health districts. The NSNU represents many but not all of the registered nurses in the province. The NSGEU represents approximately 2,500 registered nurses in the Halifax area. At present, licensed practical nurses are represented by each of the unions involved in health care (the NSNU, the NSGEU, CUPE and Unifor). CUPE and Unifor also represent employees primarily in the rural areas of the province.

5. As a result of the *Act*, there will be two health authorities. The IWK will continue as an independent health authority. The remaining nine health districts will be consolidated into a single health authority.

6. The structure of health employers in Nova Scotia has been one of continual change. At one point, the health authorities were amalgamated into four health districts. Sometime later, the health authorities were divided back out into nine. Since the mid-1970s, whenever there has been an amalgamation or division, either no change was made to union representation or employees were given the ability to vote and choose the bargaining unit that would represent them.

7. Historically, civil service employees have been represented by the NSGEU as their statutorily delegated union representative. However, when certain health services (like public health) were devolved to the health districts, employees have had the ability to choose their bargaining agent. Many, if not all, employees have chosen to remain with the NSGEU as their union.

8. Over the past year, the unions have discussed forming bargaining associations which would allow all the employees affected to continue to be represented by their current bargaining agents, and allow bargaining with the new provincial health authority to proceed by way of a multi-union bargaining association. Preparations to form bargaining associations were quite advanced by the summer of 2014. The employers raised several concerns about the multi-union bargaining association.

9. The government introduced the *Act* on September 29, 2014, and it was enacted into law on October 3, 2014. If the legislation is implemented in accordance with the interpretation it has been given by the Attorney General and the employers (represented by the Health Association of Nova Scotia) it could result in the NSGEU losing at least 3,000 but as many as 9,000 members. Also, NSGEU could become the representative of employees who were previously members of other unions and who have not been asked about whether they wanted NSGEU as their representative.

10. NSGEU believes that it has in the past been able to achieve significant gains by virtue of the fact that it represents almost all of the employees in the Halifax region. It also believes that, by dividing union representation among several unions, part of the purpose of the *Act* is to weaken the negotiating power of unions. Some unions have also expressed some concerns that the interests of rural health employees in a particular occupation do not necessarily align with the interests of employees in the same occupation working in the Halifax region. The concerns and working conditions in small rural hospitals and health centres are thought by some unions to be not comparable to the interests in the large health facilities offering specialized treatment in the Halifax region.

11. Transitional provisions in the *Act* include the following limitations on union representation of employees working in areas serviced by the two new health authorities:

s. 89(1) Subject to subsection (2), the jurisdiction of the mediator-arbitrator to determine matters under Section 88 is subject to the following limitations:

(a) there must be four bargaining units of unionized employees for each health authority, namely, a nursing bargaining unit, a health care bargaining unit, a clerical bargaining unit and a support bargaining unit;

(b) all unionized employees who occupy positions that must be occupied by a registered nurse or a licensed practical nurse must be included in the nursing bargaining unit for the health authority that employs those employees;

(c) each union

(i) may represent only one of the four bargaining units for a health authority, and

(ii) must represent the same type of bargaining unit for each health authority;

(d) to be eligible to represent a bargaining unit, a union must, immediately before the coming into force of this Section, represent the unionized employees in a bargaining unit of the same type for at least one district health authority.

12. Section 83 of the *Act* renders certain provisions of the *Trade Union Act*, including those dealing with establishing, amending, transferring, or revoking certification and bargaining rights, inapplicable with respect to labour relations between health authorities, unionized employees, and the bargaining agents for those unionized employees. As a result, affected unionized employees appear to be barred from changing unions, establishing a new union to represent them, or otherwise changing their collective bargaining relationship with their employer or their bargaining agent.

13. Section 90(1) of the *Act* addresses the composition of the four prescribed bargaining units, and specifies the following factors that the mediator-arbitrator must consider in determining the bargaining agent that is to represent each bargaining unit:

- The nursing bargaining unit is to be composed of all employees who occupy nursing positions.
- The health care professional bargaining unit is to be composed of all employees who are engaged primarily in a clinical capacity to provide patient care, and who are not included in the nursing bargaining unit.

- The clerical bargaining unit is to be composed of all employees who are engaged primarily in a non-clinical capacity to perform functions that are predominantly clerical or administrative.
- The support bargaining unit is to be composed of all employees who are engaged primarily in a non-clinical capacity to provide operational support with respect to the provision of health services, and who are not included in the clerical bargaining unit.

14. In determining the bargaining agent that is to represent each bargaining unit, s. 90 also instructs the mediator-arbitrator to consider whether the selection of the proposed bargaining agent will be conducive to achieving stable and harmonious labour relations between the health authorities and unionized employees; and will be effective and efficient in promoting the provision of health care to patients at the health authorities' facilities.

II. Summary of opinion

15. As detailed in Part III below, the Supreme Court of Canada consistently relies on various sources of international and regional law – declarations, covenants, conventions, customary norms, and judicial and quasi-judicial decisions of international and regional tribunals and treaty monitoring bodies – when interpreting provisions of the Constitution of Canada and, in particular, the *Canadian Charter of Rights and Freedoms*. These sources include treaties to which Canada is party as well as treaties, such as the European Convention on Human Rights, the African Charter on Human Rights, and the American Convention on Human Rights, to which Canada is not party. As detailed in Part IV below, legal norms relating to freedom of association in international law have long influenced judicial interpretation of the guarantee of freedom of association enshrined in s. 2(d) of the Charter.

16. As detailed in Part V below, the right of workers to establish and join organizations as an incident of freedom of association enjoys a secure legal footing in international law from its recognition as such in several international and regional legal instruments and institutions. Of the international and regional institutions canvassed in this opinion, the International Labour Organization ("ILO") has addressed this issue with the greatest specificity. According to ILO bodies, the right of workers to establish and join organizations of their own choosing in full

freedom cannot be said to exist unless such freedom is fully established in law and fact. Relevant to these proceedings is that this right:

- contemplates the effective possibility of forming organizations independent of, and in addition to, those which already exist;
- prohibits governments from establishing a trade union monopoly by permitting only one organization in the area in which a worker carries on his or her occupation;
- prohibits governments from placing one organization at an advantage or at a disadvantage in relation to other organizations; and
- prohibits governments, whether by legislative, executive or administrative means, from dissolving an organization or cancelling the registration of an organization.

17. Section 89(1) and related provisions of the *Act*, which require the arbitrator to: (1) establish four bargaining units of unionized employees for each health authority, namely, a nursing bargaining unit (which is to include registered nurses and licensed practical nurses), a health care bargaining unit, a clerical bargaining unit, and a support bargaining unit; (2) ensure that each union represent only one of the four bargaining units for a health authority and represent the same type of bargaining unit for each health authority; and (3) restrict eligibility to represent a bargaining unit to unions that previously represent unionized employees in a bargaining unit of the same type for at least one district health authority, interfere with the rights of workers to establish and join organizations of their own choosing.

18. Specifically:

- insofar as the *Act* does not contemplate the effective possibility of forming organizations independent of, or in addition to, those which already exist in health authorities in Nova Scotia or which will exist as a result of the Act: (1) it violates the right of workers to establish and join organizations of their own choosing as guaranteed by International Labour Organization Convention No. 87, to which Canada is party; (2) it violates the right to form and join a union as guaranteed by the International Covenant on Economic Social and Cultural Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR"), to which Canada is party; and (3) it is inconsistent with the European Convention on Human Rights and the European Social Charter.

- insofar as the *Act* establishes trade union monopolies by stipulating that each union may represent only one of the four bargaining units for a health authority, and must represent the same type of bargaining unit for each health authority: (1) it violates the right of workers to establish and join organizations of their own choosing as guaranteed by Convention No. 87, to which Canada is party; (2) it violates the right to form and join a union as guaranteed by the ICESCR and the ICCPR, to which Canada is party; and (3) it is inconsistent with the European Convention on Human Rights and the European Social Charter.

- insofar as the *Act* effectively places one or more unions at a disadvantage in relation to the others by redistributing representation rights among the four unions to the benefit of some unions and to the detriment of other unions: (1) it violates the right of workers to establish and join organizations of their own choosing as guaranteed by Convention No. 87, to which Canada is party; (2) it violates the right to form and join a union as guaranteed by the ICESCR and the ICCPR, to which Canada is party; and (3) it is inconsistent with the European Convention on Human Rights and the European Social Charter; and

- insofar as the *Act* effectively amounts to the dissolution of an organization or organizations or the cancellation of registration of an organization or organizations, whether by legislative, executive or administrative means: (1) it violates the right of workers to establish and join organizations of their own choosing as guaranteed by Convention No. 87, to which Canada is party; (2) it violates the right to form and join a union as guaranteed by the ICESCR and the ICCPR, to which Canada is party; and (3) it is inconsistent with the European Convention on Human Rights and the European Social Charter.

19. As also detailed in Part V below, jurisprudence emanating from other international and regional human rights institutions canvassed in this opinion reveals a similar approach to the *Act*'s restrictions on the right of workers to establish and join organizations of their own choosing, albeit not at the level of specificity provided by ILO bodies.

III. What role does international law play in judicial interpretation of the Constitution of Canada?

20. Unlike the constitutions of some countries,[1] the Constitution of Canada is silent on the domestic legal status of international treaties. Traditionally understood, Canada is a dualist jurisdiction, whereby an international treaty obligation does not become domestic law unless it has been implemented in domestic legislation.[2] When an international legal obligation is implemented by legislation, its domestic legal force is the product of the implementing statute, not the treaty. The treaty itself creates no domestic legal obligations. The justification for this approach is often said to lie in the fact that the Crown in its executive capacity, by entering into treaties with foreign states, should not be entitled to usurp federal or provincial legislative authority.[3]

21. This traditional view of the domestic implications of international treaty obligations, however, has gradually but steadily been complemented, if not replaced, by a much more porous understanding of the boundary between the international and national legal spheres.[4] This contemporary approach reflects an increased willingness on the part of the judiciary in democratic societies to look to comparative, regional and international legal developments for assistance and guidance in legal interpretation.

22. Five related developments account for this shift in Canada's constitutional relationship to the international legal order.

23. First, the Court relies on international law to determine the constitutional distribution of legislative authority between Parliament and the provincial legislatures. In *R v. Crown*

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[1] South Africa's Constitution, for example, provides that "in interpreting the provisions of this Chapter [dealing with fundamental rights], a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

[2] *AG Canada v. AG Ontario,* [1937] AC 326.

[3] See *Capital Cities Communications v. CRTC,,* [1978] 2 SCR 141 at 173 ("certainly the convention [the 1937 Inter-American Radio Communications Convention] *per se* cannot prevail against the express stipulations of the Act") (per Laskin C.J.); *Daniels v. White and the Queen* [1968] SCR 517 (if a statute is unambiguous … its provisions must be followed even if they are contrary to the established rules of international law [specifically, the 1916 Canada-U.S. Migratory Birds Convention]") (per Hall J. dissenting, but not on this point, and with the concurrence of Ritchie and Spence JJ); *Re Arrow River and Tributaries Slide & Boom Co. Limited* [1932] SCR 495, at 510 (per Lamont J.).

[4] See generally K Knop, "Here and There: International Law in Domestic Courts" (2000) 32 New York University Journal of International Law & Policy 501.

Zellerbach,[5] the Court was asked to determine the constitutionality of a provision in a federal statute enacted to implement international legal obligations Canada had assumed by ratifying an international treaty governing marine pollution. The provision in question encroached on provincial legislative authority over provincial waters. In holding that marine pollution constituted a matter of national concern that fell under Parliament's peace, order and good government power, the Court noted that the international treaty treats marine pollution as "a distinct and separate form of water pollution having its own characteristics and scientific considerations."[6] The presence of an international treaty, in other words, suggests that its content can constitute a matter of national concern assigned to Parliament under its peace, order and good government power.

24. Second, the Court relies on international law to determine the extraterritorial reach of the *Canadian Charter of Rights and Freedoms*. In *R v. Hape,* for example, at issue was whether RCMP officers were subject to the Charter when participating in a search and seizure in the Turks and Caicos Islands during an investigation of suspected money laundering activities of a Canadian businessman. Justice LeBel, for a majority of the Court, held that, generally speaking, the Charter does not apply to Canadian officials participating in another state's investigation so as to require it to conform to Canadian law. Justice LeBel relied on the relationship between principles and obligations of customary international law, on the one hand, and the common law, on the other, in support of this conclusion.[7]

25. The international legal customs on which LeBel J. relied involved principles relating to the limits of a state's jurisdiction, the sovereignty and domestic affairs of other states, and the comity of nations. It is not controversial to hold that these principles form part of the common law. As noted by LeBel J., unlike international treaty obligations, customary international law does not require implementing legislation to acquire domestic legal force. Canadian courts have long followed the English tradition[8] that customary international law forms part of the common law.[9]

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[5] *Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401.
[6] *Ibid.* at para 38.
[7] *R. v. Hape,* [2007] 2 SCR 292.
[8] See, e.g., *Trendtex Trading Corp. v. Central Bank of Nigeria,* [1977] 1 QB 529 (CA).
[9] *The Ship "North" v. The King* (1906) 37 SCR 385, at p. 394; *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts,* [1943] SCR 483, at p. 502; *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences,* [1943] SCR 208; *Saint John (Municipality of) v. Fraser-Brace Overseas Corp.*, [1958] SCR 263; *Mack*

26. To hold that customary international law is relevant to the scope of the Charter, however, bypasses the dualist requirement that legislatures are to determine whether international legal principles receive domestic legal force. Although courts presume legislation to conform to international law,[10] dualism authorizes legislatures to contradict international legal norms that crystallize domestically in the common law. By relying on customary international law to determine the territorial reach of the Charter, *Hape* suggests instead that international law assists in determining the limits and possibilities of legislative authority.

27. Not only does international law underpin a general rule governing the Charter's exterritorial reach; it also underpins an exception to this general rule. The groundwork for this exception was laid in *Hape,* when LeBel J. held that that the deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin."[11] It was brought to the surface in *Canada v. Khadr,*[12] where the Court held that the American military commissions did not possess the status of "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples," as required by Common Article 3 of the *Geneva Conventions*, to which Canada is party.[13]

28. This was sufficient for the Court in *Khadr* to conclude that the general rule established in *Hape* that the Charter does not apply to Canadian participation in the activities of a foreign state is subject to an exception that prevents Canadian authorities from engaging in activities abroad that violate Canada's international obligations. In such circumstances, the Charter binds Canada when Canadian officials abroad violate international law. Like *Hape, Khadr* illustrates the replacement of the traditional dualist view of the domestic implications of international law with a much more porous conception of the boundary between the national and international. In addition to customary international law, Canada's treaty obligations participate in determining the scope of constitutional – and, by extension, legislative – authority.

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v. Canada (Attorney General) (2002) 60 OR (3d) 737 (CA); *Bouzari v. Islamic Republic of Iran* (2004) 71 OR (3d) 675 (CA).

[10] See, e.g., *Daniels v. White*, [1968] SCR 517 at p 541 (Pigeon J.).

[11] *Hape*, above at para. 52 (LeBel J.); see also paras 51 and 101.

[12] *Canada (Justice) v. Khadr*, [2008] 2 SCR 125.

[13] *Khadr, ibid* at para 23, citing Common Article 3 of *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31, Can TS 1965 No 20 at 25; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85, Can TS 1965 No 20 at 55; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, Can TS 1965 No 20 at 163; and *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 UNTS 135, Can TS 1965 No 20 at 84.

29. Third, the Court relies on international human rights treaties to which Canada is party to interpret the content of Charter rights and freedoms. The International Covenant on Civil and Political Rights (ICCPR) and, to a lesser extent, the International Covenant on Economic, Social and Cultural Rights (ICESCR) figure especially prominently in Charter interpretation. Since the inception of the Charter in 1982, the Court has invoked provisions of the ICCPR in at least thirty eight cases[14] whereas it has invoked the ICESCR in at least thirteen cases.[15] In several cases, the Court has also made reference to legal instruments and jurisprudence under the auspices of the International Labour Organization.[16]

30. Of particular relevance is the Court's treatment of these three international legal sources in *BC Health Services v. British Columbia.*[17] The Court in *BC Health Services* noted that Canada, strictly speaking, is a dualist jurisdiction, but proceeded to treat Canada's international legal

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[14] *R v. Big M Drug Mart Ltd* [1985] 1 SCR 295; *Mills v. The Queen* [1986] 1 SCR 863; *R v. Oakes* [1986] 1 SCR 103; *R v. Smith (Edward Dewey)* [1987] 1 SCR 1045; *Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313; *R v. Milne* [1987] 2 SCR 512; *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 SCR 1326; *Reference Re Canada (Human Rights Commission) v. Taylor* [1990] 3 SCR 892; *R v. Zundel* [1992] 2 SCR 731; *R. v. Keegstra*, [1990] 3 SCR 697; *R. v. Brydges* [1990] 1 SCR 190; *McKinney v. University of Guelph* [1990] 3 SCR 229; *Kindler v. Canada (Minister of Justice)* [1991] 2 SCR 779; *R v. Tran* [1994] 2 SCR 951; *R v. Prosper* [1994] 3 SCR 236; *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315; *Chan v. Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593; *R v O'Connor* [1995] 4 SCR 411; 2747-3174 *Québec Inc v. Quebec (Régie des permis d'alcool)* [1996] 3 SCR 919; *R v. Lucas* [1998] 1 SCR 439; *Reference re Secession of Quebec* [1998] 2 SCR 217; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)* [2000] 1 SCR 665; *R v Sharpe*, [2001] 1 SCR 45; *United States v. Burns* [2001] 1 SCR 283; *R v. Advance Cutting & Coring Ltd.* [2001] 3 SCR 209; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Lavoie v. Canada* [2002] 1 SCR 769; *Chamberlain v. Surrey School District No 36* [2002] 4 SCR 710; *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76; *Harper v. Canada (Attorney General)* [2004] 1 SCR 827; *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391; *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3; *Bou Malhab v. Diffusion Métromédia CMR Inc.*, [2011] 1 SCR 214; *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013] 3 S.C.R. 866; *Divito v. Canada (Public Safety and Emergency Preparedness*, [2013] 3. S.C.R. 157; *Canada (Attorney General) v. Whaling*, 2014 SCC 20; *Kazemi v. Islamic Republic of Iran*, 2014 SCC 62.

[15] *Reference Re Public Service Employee Relations Act (Alta)* above; *Slaight Communications Inc. v. Davidson* [1989] 1 SCR 1038 ; *Irwin Toy Ltd v. AG Quebec* [1989] 1 SCR 927; *Reference re Secession of Quebec* [1998] 2 SCR 217; *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157; *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)* [2000] 1 SCR 665; *R v. Sharpe* [2001] 1 SCR 45; *R v. Advance Cutting & Coring Ltd.* [2001] 3 SCR 209; *Gosselin v. Québec (Attorney General)* [2002] 4 SCR 429; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc* [2003] 3 SCR 228; *Health Services and Support-Facilities Subsector Bargaining Assn v. British Columbia*; *Ontario (Attorney General) v. Fraser*, above.

[16] See, eg, *Reference Re Public Service Employee Relations Act (Alta.)* above; *RWDSU v. Saskatchewan*, above; *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.* [2003] 3 SCR 228; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, above; *Ontario (Attorney General) v. Fraser*, above.

[17] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, ibid.*

obligations to protect freedom of association as enshrined in the ICESCR, the ICCPR, and ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize[18] as relevant to the interpretation of the Charter's guarantee of freedom of association. The scope of protection accorded to the right to bargain collectively in these international legal instruments was one of several reasons why the Court held that the constitutional guarantee includes a right to bargain collectively and requires legislative action to secure its protection.

31. Notwithstanding its nod to dualism, *BC Health Services* departs from the dualist requirement that international treaty obligations require legislative implementation to acquire domestic legal force. While treaty obligations do not assume legislative status absent legislative action, they now participate in the imposition of constitutional obligations on legislatures.

32. Fourth, the Court does not solely look to treaties that Canada has ratified for guidance when interpreting the Charter.[19] In *Suresh v. Canada (Minister of Citizenship and Immigration),* for example, the Court relied on the European Convention on Human Rights,[20] the African Charter on Human Rights, and the American Convention on Human Rights – in addition to treaties to which Canada is party – to reach the conclusion "that international law rejects deportation to torture, even where national security interests are at stake," and that this norm "best informs the content of the principles of fundamental justice under s 7 of the *Charter.*"[21]

33. Fifth, the Court invokes non-binding international instruments, commonly known as "soft law," to interpret the scope and content of constitutional provisions. It has done so even where Canada is not – and, in all likelihood, never will be – a signatory of the instrument in question. In *Suresh,* for example, the Court cited the Universal Islamic Declaration of Human Rights in support of its conclusion that deportation to torture offends constitutional principles of fundamental justice.[22]

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[18] 68 UNTS 17 (entered into force July 4 1950).
[19] See Stephen Toope, "Canada and International Law," (1998) 27 Proc Can Council Int'l L 33 at 36 ("at the Supreme Court of Canada there appears to be no great distinction between treaties actually ratified by Canada and those to which Canada is not and could not be a party").
[20] The jurisprudence of the European Court of Human Rights on the European Convention on Human Rights plays an especially prominent role in Charter interpretation. See, eg, *R. v. Oakes*, above; *R v. Jones,* [1986] 2 SCR 284; *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606; *R. v. Advance Cutting & Coring Ltd*, above; *Sauvé v. Canada (Chief Electoral Officer)*, above; *Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 SCR 350; *Alberta v. Hutterian Brethren of Wilson Colony* [2009] SCR 567.
[21] [2002] 1 SCR 3.
[22] *Suresh,* above.

34. The Court has also relied on soft law initiatives still in draft form for interpretive guidance. In *Mitchell v. MNR*,[23] for example, Justice Binnie, in a concurring judgment, referred to the draft *Inter-American Declaration on the Rights of Indigenous Peoples*[24] and the then-draft *UN Declaration on the Rights of Indigenous Peoples*[25] in the course of an analysis of the transnational dimensions of aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982.*

35. Nowhere is the Court's reliance on international legal norms to determine the limits of constitutional authority more striking than when international law serves as a basis for a reversal of constitutional precedent. In 1991, the Court rendered reasons in *Kindler v. Canada*,[26] upholding the constitutionality of the Minister of Justice's decision to surrender a fugitive to the United States without seeking assurances from American officials that the death penalty would not be imposed or, if imposed, not carried out. Ten years later, in *United States v. Burns,* the Court effectively reversed its holding in *Kindler*, ruling that assurances from a foreign jurisdiction that the death penalty would not be imposed or, if imposed, not carried out are constitutionally required in all but exceptional cases. Casting *Kindler* as establishing a balancing test for determining the constitutionality of extradition without assurances, the Court in *Burns* held that "a balance which tilted in favour of extradition in *Kindler* ... now tilts against the constitutionality of such an outcome."[27]

36. One of the reasons for this tilt, according to the Court, is that "[t]he international trend against the death penalty has become clearer" since its decision in *Kindler.* The Court acknowledged that international law has yet to yield a legal "norm against the death penalty, or against extradition to face the death penalty," but the lack of a binding legal international legal obligation did not stop the Court from relying on international legal sources in support of overturning *Kindler.*[28] It referred to numerous hard and soft international legal instruments and

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[23] [2001] 1 S.C.R. 911.
[24] Inter-American Commission on Human Rights (September 18, 1995).
[25] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1994/45.
[26] *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779. See also *Reference re Ng Extradition (Can.)*, [1991] 2 SCR 858.
[27] [2001] 1 SCR 282, at para 144.
[28] Compare *R. v. Hape,* above at para 55, where LeBel J held that both international obligations *and* principles of international law are relevant to Charter interpretation ("This Court has also looked to international law to assist it in interpreting the Charter. Whenever possible, it has sought to ensure consistency between its interpretation of the

initiatives that suggest "significant movement towards acceptance" of such a norm.[29] These included both instruments and initiatives to which Canada is – and is not – a party or participant, namely, the *European Convention on Extradition,* the United Nations *Model Treaty on Extradition,* and calls by the UN Commission on Human Rights, the UN Secretary-General, the UN Special Rapporteur on Extrajudicial Executions, the Parliamentary Assembly of the Council of Europe, and the European Parliament for the abolition of the death penalty.[30]

37. In summary, the Court relies on international and regional legal instruments as persuasive sources of guidance in constitutional interpretation regardless of whether Canada is party to their terms. This is why, when seeking to interpret the nature and scope of s. 2(d) of the Charter, it is relevant to canvas developments relating to the European Convention on Human Rights and the European Social Charter, as well as developments in the United Nations and the ILO.

IV. What role does international human rights law play in judicial interpretation of s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

38. International legal norms have long influenced judicial interpretation of the guarantee of freedom of association enshrined in s. 2(d) of the Charter. In the lead case of the Labour Trilogy, the *Alberta Reference*, at issue was the constitutionality of several provincial statutes prohibiting strikes by public service employees, firefighters, hospital employees and police officers, and substituting an arbitration scheme for resolving bargaining disputes.[31]

39. The plurality judgment by Justice LeDain and the concurring judgment by Justice McIntyre do not invoke international legal norms in their respective reasons. In his dissent, however, Chief Justice Dickson stated that

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Charter, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other").

[29] *Burns,* above at para 89. For more discussion of the role that international law plays in extradition cases, see Ed Morgan, "In the Penal Colony: Internationalism and the Canadian Constitution" (1999) 49 UTLJ 447.

[30] See, respectively, *European Convention on Extradition,* Eur. T.S. No. 24, signed December 13, 1957; *Model Treaty on Extradition* (passed by the General Assembly in December 1990); UN Commission on Human Rights, Resolutions 1999/61 (adopted April 28, 1999 and 2000/65 (adopted April 27, 2000); *Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur*, UN Doc. E/CN.4/1997/60 at para 79; *Extrajudicial, summary or arbitrary executions: Note by the Secretary-general*, UN Doc. A//51/457 at para 145; Council of Europe, Parliamentary Assembly, Resolution 1044 (1994); European Parliament, Resolutions B4-0468, 0487, 0497, 0513 and 0542/97 (1997).

[31] *Alberta Reference*, above.

> The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.[32]

40. Dickson C.J. also stated that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[33] International instruments, including the ICCPR, the ICESCR, and ILO Convention No. 87, according to Dickson C.J., extended international legal protection to the right to bargain collectively and the right to strike as incidents of freedom of association, which in turn figured prominently in his reasons why they ought to receive constitutional protection.

41. International legal norms assumed greater prominence in *Dunmore v. Ontario*, [34] where they were invoked by a majority of the Court as support for its decision to declare unconstitutional a statutory provision excluding agricultural workers from the protection of a provincial collective bargaining regime. As found by the Court, the effect of the exclusion was to render it virtually impossible for agricultural workers to form a union to represent their interests to employers. The Court ordered the legislature to provide a statutory framework that secures the right of agricultural workers to form an association and protects freedoms essential to its exercise, such as freedom of assembly, freedom from interference, coercion and discrimination by an employer, and freedom to make lawful representations and participate in the lawful activities of an association.

42. *Dunmore* is particularly noteworthy for its engagement with international law. In support of his holdings, Bastarache J. referred not only to ILO Convention No. 87,[35] which Canada has ratified, but also ILO Convention No. 11 concerning the Rights of Association of Agricultural Workers[36] and ILO Convention No. 141 concerning Organisations of Rural Workers, neither of which Canada has ratified. The fact that the latter two instruments did not impose binding

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[32] *Ibid,* at para 57. See also *Godbout v. Longueuil (City)* [1997] 3 SCR 844, at para 69 (La Forest J.) (art 12 of the ICCPR supports interpreting s 7 of the Charter as protecting a right to an abode); *R v. Jones* [1986] 2 SCR 284 (Wilson J.) (art 8(1) of the European Convention supports interpreting s 7 of the Charter as protecting a right of parents to educate children in accordance with their religious and philosophical convictions).

[33] But see *B(R) v. Childrens Aid Society of Metropolitan Toronto* [1995] 1 SCR 315, at 349-50, where restrictive decisions by the Human Rights Committee under the ICCPR were relied on to exclude certain economic interests from the scope of s 7 of the Charter.

[34] [2001] 3 S.C.R. 1016.

[35] 67 UNTS 17.

[36] 38 UNTS 153.

international legal obligations on Canada possessed no significance to Bastarache J.'s reasoning. They lent persuasive force to his conclusion that freedom of association, in some circumstances, requires legislatures to legislate for its protection.

43. Justice Bastarache also relied on the jurisprudence of the ILO's Committee on Freedom of Association ("CFA"), a body not responsible for delineating binding obligations arising from ILO Conventions. As described in more detail in Part V of this opinion, the CFA does not enforce or monitor state compliance with ILO Conventions. The ILO Constitution provides for other formal legal processes for allegations of noncompliance with a Convention by a state party to its terms; for the making of authoritative findings of fact in this regard; for authoritative judicial interpretations of treaty obligations; for the articulation of recommendations; and ultimately for remedies for breach. The CFA hears cases brought against member states of the ILO alleging failures to adhere to various principles that relate to freedom of association, and renders its views on the admissibility and merits of such complaints.

44. In rendering its views, the CFA often makes reference to the terms of various Conventions, including Conventions that the state in question has failed to ratify, but it does not do so in ways that suggest that a state owes obligations under a Convention that it has not ratified. Instead, it makes reference to Conventions to illuminate the nature and scope of the principles of freedom of association that it is charged with promoting.

45. By invoking treaties which Canada has not ratified in addition to Convention No. 87, and the views of an international body devoted to the production of soft international legal norms, *Dunmore* affirms a conception of the relationship between the national and international legal orders markedly different than the dualist vision.

46. International legal norms also helped to inform the Court's decision in *BC Health Services*.[37] At issue in *BC Health Services* was legislation that unilaterally introduced changes to existing rules governing employee transfers, job security, and layoffs and invalidating inconsistent provisions of existing collective agreements. Expressly overturning the Labour Trilogy, the Court held that freedom of association protects the right to bargain collectively and imposes a duty on employers to negotiate the terms and conditions of collective agreements in good faith.

[37] *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391.

47. Specifically, McLachlin C.J. and LeBel J. stated:

> [89] The constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. ...
>
> [90] ... [T]he state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining, conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in pursuit of a common goal of peaceful and productive accommodation.[38]

48. The Court in *BC Health Services* relied on the ICCPR, the ICESCR, and ILO Convention No. 87, all ratified by Canada, in support of these conclusions. Vindicating Dickson C.J.'s dissent in the *Alberta Reference,* it held that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[39]

49. But, as in *Dunmore*, the Court in *BC Health Services* also relied on principles, developed by the ILO's Committee on Freedom of Association, that inform the international guarantee of freedom of association.[40] In addition, it relied on a soft international legal instrument, the 1998 ILO Declaration on Fundamental Principles and Rights at Work,[41] discussed in greater detail in Part V of this opinion, stating that it reveals a "global consensus" and "the current state of international thought on human rights."[42]

50. International law also played a prominent role in *A.G. Ontario v. Fraser*,[43] which dealt with the constitutionality of legislation designed to comply with the Court's ruling in *Dunmore.* Responding to a dissent by Rothstein J. arguing that *BC Health Services* should be overturned,

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[38] *Ibid,* at paras. 89, 90.
[39] *Ibid,* at para 70.
[40] See Bernard Gernigon, Alberto Odero & Horacio Guido, "ILO Principles Concerning Collective Bargaining" (2000) 139 Int'l Lab Rev 33 at pp 51-52.
[41] 6 IHRR 285 (1999).
[42] Above at para 78.
[43] 2011 SCC 20.

McLachlin C.J. and LeBel J. relied in part on international legal norms to support the Court's decision in *BC Health Services* to overturn the Labour Trilogy. Chief Justice McLachlin and LeBel J. noted that the ILO's CFA had reviewed the legislation at issue in *BC Health Services* and had concluded that it violated the principle of freedom of association because the voiding of terms of existing collective agreements "may have a detrimental effect on workers' interests in unionization ... if the results of bargaining are constantly cancelled by law."[44] The views of the CFA were not referred to by the majority in *BC Health Services* although they predated the Court's decision in that case by four years. But they served as *ex post* validation of *BC Health Services'* reversal of key holdings of the Labour Trilogy.[45] Nonbinding international legal norms, in other words, served as a basis for affirming a reversal of constitutional precedent.

51. Interestingly, Rothstein J., dissenting, also relied on international law to press for reversing *BC Health Services*. A proper understanding of international law, according to Rothstein J., supports overturning *BC Health Services* and restoring the Labour Trilogy's holding that freedom of association does not protect a right to bargain collectively. Elsewhere the Court has identified the considerations relevant to deciding whether to overturn constitutional precedent. They include whether the prior decision departed from the purpose of a constitutional guarantee; whether it is unworkable as its application is unnecessarily complex and technical; whether it is contrary to "sound principle;" and whether it results in unfairness.[46] While he was unable to convince a majority of the Court that their understanding of international law was incorrect, Rothstein J.'s reasons suggest the current state of international law assists in determining whether a precedent is contrary to "sound principle." On his account, international law not only supports reversing constitutional precedent. It supports restoring overturned precedent to the status of constitutional validity.

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[44] CFA Report No 330 (2003), vol LXXXVI, Series B, No 1 at para. 304.
[45] Nor did the majority in *Fraser* refer to the CFA's criticism of the AEPA itself: see CFA Report No 358 (2009), vol XCIII, 2010, Series B, No 3.
[46] *R v. Henry,* [2005] 3 SCR 609 at paras. 45-46 (Binnie J.).

V. What is the status of the right to establish and join an organization as an incident of freedom of association in international law, and to what extent do legislative provisions imposing restrictions on the right to establish and join an organization such as those set out in s. 89(1) and related provisions of the *Health Authorities Act*, S.N.S. 2014, c. 32 violate freedom of association as guaranteed in international law?

51. The right to establish and join an organization as an incident of freedom of association enjoys a secure legal footing in international human rights law by virtue of its protection in several international and regional legal instruments and institutions, namely, Conventions and Declarations overseen by the ILO; the ICCPR, overseen by the UN Human Rights Committee; the ICESCR, overseen by the UN Committee on Economic, Social and Cultural Rights; the European Convention on Human Rights, overseen by the European Court of Human Rights; and the European Social Charter, overseen by the European Committee on Social Rights. As detailed below, jurisprudence from each of these institutions holds that laws or governmental action that restrict or prevent workers from freely establishing or joining an organization constitutes an interference with freedom of association.

A. The International Labour Organization

1. Introduction

52. Since 1919, the ILO has been the pre-eminent international body concerned with the promotion and enforcement of international labour rights and standards. More than 175 member states send government, employer and employee representatives to the ILO's yearly International Labour Conference. ILO membership obliges states to submit treaties to the proper domestic authority for ratification, and to report on non-ratified treaties when requested. In addition, employers' and workers' associations can lodge complaints that a state is not fulfilling its obligations under a convention that it has ratified.

53. The ILO's Constitution, adopted immediately after the First World War and enshrined in the Treaty of Versailles, proclaims the protection of freedom of association to be "urgently required."[47] The 1944 ILO Declaration of Philadelphia reaffirms the ILO's commitment to freedom of association, and calls for "the effective recognition of the right of collective

[47] International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO)* (1 April 1919), 2nd preambular para.

bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and measures in the preparation and application of social and economic measures."[48]

54. Four years later, just before the adoption of the Universal Declaration of Human Rights in 1948, the ILO adopted the Freedom of Association and Protection of the Right to Organize Convention (No. 87). Subsequently ratified by 150 states, including Canada, Convention No. 87 codifies freedom of association as a right in conventional international law.[49]

55. Article 2 of Convention No. 87 provides that "workers ... shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without any previous authorisation."[50] Article 2 protects the rights of workers to right to establish and join organizations "without distinction whatsoever." Article 8 provides that "[w]orkers' ... organisations shall not be liable to be dissolved or suspended by administrative authority." Although Article 9 creates a potential exception for members of the armed forces and the police, Convention No. 87 applies to all other public, as well as private, sector employees.[51]

56. According to the preliminary work leading to the adoption of Convention No. 87, "one of the main objects of [its] guarantee of freedom of association is to enable employers and workers to combine to form associations ... capable of determining wages and other conditions of employment by means of freely concluded collective agreements."[52] This objective is reflected in Article 3 of the Convention, which provides that "[w]orkers' shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes," and requires states to "refrain from any interference which would restrict this right or impede the lawful exercise thereof."

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[48] Declaration concerning the aims and purposes of the ILO (Declaration of Philadelphia) (10 May 1944), art. 3(e).
[49] Fifty one – 30% – of these ratifications occurred in the last 20 years. Convention No. 87 was foreshadowed by two sector-specific Conventions on freedom of association: the Right of Association (Agriculture) Convention (No. 11), 1921; and the Right of Association (Non-Metropolitan Territories) Convention (No. 84), 1947.
[50] Art. 2, Convention No. 87.
[51] Committee on Freedom of Association Digest of Decisions 2006 (hereafter "CFA Digest"), paras. 209, 216, 218, 220.
[52] *Freedom of Association and Industrial Relations,* Report VII, ILC, 1947 International Labour Conference, 30th Session, Geneva, 1947, at p. 52.

2. The 1998 Declaration

57. Freedom of association is also enshrined in the ILO 1998 Declaration on Fundamental Principles and Rights at Work. The 1998 Declaration is the culmination of intense efforts on the part of the ILO and its member states to speak to the international legal significance of increased calls for employer flexibility and regulatory experimentation in light of economic globalization, technological innovation, and new forms of production.

58. Engaging these developments, the ILO, together with several international and regional international institutions, has distilled international labour law down to a core set of labour rights that are held out to operate as universal constraints on employer flexibility and regulatory experimentation. Enshrined in the 1998 Declaration, these core labour rights constitute baseline entitlements or a floor set of rights that, as a matter of international law, all states must comply regardless of their level of development or location in the international economy. Canada was an active participant in drafting the 1998 Convention, and voted in favour of its adoption.

59. Specifically, the 1998 Declaration states that:

> The International Labour Conference,
>
> 1. Recalls:
>
> (a) that if freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;
>
> (b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.[53]

The seven "fundamental" Conventions to which article 1(b) refers govern freedom of association and collective bargaining (Nos. 87 and 98); forced labour (Nos. 29 and No. 105); non-discrimination (Nos. 100 and No. 111); and minimum age (No. 138).

60. These Conventions define and elaborate four basic principles: freedom of association and the effective right of collective bargaining; the prohibition of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of

[53] *ILO Declaration on Fundamental Principles and Rights at Work.*

employment or occupation. The principles together constitute what has been referred to as a set of core labour rights.[54]

61. The significance of the 1998 Declaration lies in the fact that it identifies an international conception of what constitutes the core of international labour law to be respected by all states. More importantly, the 1998 Declaration was drafted in such a way as to draw directly from the ILO Constitution, meaning that all ILO member states are automatically committed to the Declaration simply by virtue of membership. Article 2 of the 1998 Declaration states that

> all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions, including "freedom of association and the effective recognition of the right to collective bargaining."[55]

62. The ILO is not alone in calling for the domestic protection of core labour rights. Other international institutions have also called on states to promote core labour rights in the face of economic globalization. The UN Committee on Economic, Social and Cultural Rights, for example, recently stated that "[t]he right to form and join trade unions may be threatened by restrictions upon freedom of association, restrictions claimed to be "necessary" in a global economy, or by the effective exclusion of possibilities for collective bargaining, or by the closing off of the right to strike for various occupational and other groups."[56] Similarly, the OECD, the World Bank, the WTO, and the UN have accepted the idea – if not the reality – of core labour rights as appropriate international legal aspirations.[57]

63. On its own, the obligation contained in the 1998 Declaration to respect, promote and realize core labour rights is not binding at international law, as the Declaration is aspirational in nature. But membership in the ILO is predicated on a commitment, explicit in the Treaty of

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[54] For an earlier articulation, see OECD, *Trade, Employment and Labour Standards: A study of core workers' rights and international trade* (1996) (articulating five core labour standards, separating freedom of association from the right to organize and bargain collectively).
[55] International Labour Organization, *Declaration of Fundamental Principles and Rights at Work*, 1998, A.2(a).
[56] Committee on Economic, Social and Cultural Rights, *Statement on Globalization and Economic, Social and Cultural Rights* (1998).
[57] OECD, *Trade, Employment and Labour Standards: A study of core workers" rights and international trade* (1996); World Bank, *Workers in a Changing World* (in *World Development Report, 1995*); WTO, *Singapore Ministerial Declaration* (1996); UN, *Global Compact* (2000).

Versailles, to securing core labour rights.[58] The obligation contained in the 1998 Declaration is also consistent with binding provisions addressing the human rights of workers in other international instruments, including the two International Covenants and the numerous ILO Conventions to which many states are party. As such, it is consistent with more general principles of customary international law, which prohibit all states from practicing or encouraging gross violations of certain fundamental human rights.

64. Together with its acceptance by states and other international institutions, the 1998 Declaration arguably evinces a general and consistent practice of states, informed by a sense of legal obligation, to respect core labour rights.[59] If this is the case, core labour rights possess the status of customary international law. As customary international law, states are under a binding international legal obligation to legislate for their protection, and international institutions, are obligated to take them into account when regulating the activities of its members.[60]

65. Regardless of its precise legal status at international law, the 1998 Declaration, together with its affirmation by other international institutions, demonstrates convincingly that freedom of association in general and the right to establish and join organizations in particular have acquired heightened prominence and significance in international law.

3. The Committee of Experts on the Application of Conventions and Recommendations

66. Established in 1926, the Committee of Experts on the Application of Conventions and Recommendations ("CEACR") is an ILO body responsible for monitoring state compliance with ILO Convention obligations. It is currently composed of 20 eminent jurists appointed by the ILO Governing Body for three-year terms. The Experts come from different geographic regions, legal systems and cultures. The Committee's role is to provide an impartial and technical evaluation of the state of application of international labour standards. Once a country has ratified an ILO

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[58] Compare Virginia A. Leary "The Paradox of Workers" Rights as Human Rights" in L. Compa and S. Diamond (eds), *Human Rights, Labor Rights and International Trade* (Philadelphia: University of Pennsylvania Press, 1996) 22-47, 22-47 at 29 ("membership in the ILO implies a commitment to freedom of association … explicit in the ILO Constitution and the Declaration of Philadelphia").

[59] Compare *Restatement (Third), Foreign Relations Law of the United States*, s. 102(2) ("[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation").

[60] See generally Howse and Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Montreal: International Centre for Human Rights and Democratic Development, 2000); see, specifically, Janelle M. Diller and David A. Levy, "Child Labor, Trade and Investment: Toward the Harmonization of International Law" (1997) 91 American Journal of International Law 663 at 694 (international trade law must be harmonized with customary international law prohibiting exploitative forms of child labour).

Convention, it is obliged to report regularly on measures it has taken to implement it. Governments are required to submit copies of their reports to employers' and workers' organizations. These organizations may comment on the governments' reports; they may also send comments on the application of conventions directly to the ILO.

67. When examining the application of international labour standards, the CEACR makes two kinds of comments: observations and direct requests. Observations contain comments on fundamental questions raised by the application of a particular convention by a state. These observations are published in the Committee's annual report together with what is called a "General Report."

68. The CEACR also provides "General Surveys" on freedom of association. In its 1994 General Survey, the CEACR stated that "the freedom, de facto and de jure, to establish organizations is the foremost among trade union rights and is the essential prerequisite without which the other guarantees enunciated in Conventions Nos. 87 and 98 would remain a dead letter."[61]

69. In its 1994 General Survey, the CEACR addressed the situation where governments directly or indirectly provide that only one trade union may be established for a given category of workers:

> The right of workers to establish and join organizations of their own choosing raises the problem of trade union monopoly. The difficulty arises where the legislation provides, directly or indirectly, that only one trade union may be established for a given category of workers. Although it was clearly not the purpose of the Convention [No. 87] to make trade union diversity an obligation, it does at the very least require this diversity to remain possible in all cases. There is a fundamental difference between, on the one hand, a trade union monopoly established and maintained by law and, on the other hand, *voluntary* groupings of workers or unions which occur (without pressure from the public authorities, or due to the law), because they wish, for instance, to strengthen their bargaining position, coordinate their efforts to tackle ad hoc difficulties which affect all their organizations, etc. It is generally to the advantage of workers and employers to avoid proliferation of competing organizations, but trade union unity directly or indirectly imposed by law runs counter to the standards expressly laid in the Convention.[62]

70. In its 1994 General Survey, the CEACR also held that the right to establish and join organizations of one's own choosing prohibits governments from enacting laws that authorize

[61] CEACR, General Survey (Geneva: ILO, 1994), para. 44.
[62] CEACR, General Survey (Geneva: ILO, 1994), para. 91.

the placing of "one occupational organization at an advantage or disadvantage in relation to the others."[63] This is because "the choice of workers regarding the organization to which they intend to belong may be influenced, which would "compromise the right of workers ... to establish and join organizations of their own choosing."[64]

71. In its 1994 General Survey, the CEACR also held that the right to establish and join organizations of one's own choosing prohibits governments from dissolving or suspending workers' organizations "unless accompanied by all of the necessary guarantees."[65] Specifically, "[i]t is preferable for legislation not to allow dissolution or suspension of workers' organizations by administrative authority, but if it does, the organization affected by such measures must have the right of appeal to an independent and impartial judicial body which is competent to examine the grounds for the administrative measure and, where appropriate, to rescind such measure."[66] These guarantees must extend to "measures, which cannot be described as dissolution or suspension by administrative authority in the strict sense of the term," but which nonetheless "have a similar effect on the organizations concerned."[67] The 1994 General Survey lists as examples, measures that "may consist in the loss of advantages which are essential to carrying out [an organization's] activities, or a condition upon which their existence depends; and arbitrary cancellation of registration by an administrative authority or annulment or suspension of legal personality."[68]

4. The Committee on Freedom of Association

72. The ILO's Committee on Freedom of Association ("CFA") has provided greater specificity to the general principles laid down by the CEACR governing the nature and scope of the right to establish and join organizations of one's own choosing. The CFA is a body ultimately charged with promoting the principles of freedom of association. As stated previously, the CFA does not enforce or monitor state compliance with ILO Conventions. Instead, the CFA hears cases brought against member states of the ILO alleging failures to adhere to various principles that relate to freedom of association, and renders its views on the admissibility and merits of such

[63] CEACR, General Survey (Geneva: ILO, 1994), para. 104.
[64] CEACR, General Survey (Geneva: ILO, 1994), para. 104.
[65] CEACR, General Survey (Geneva: ILO, 1994), para. 185.
[66] CEACR, General Survey (Geneva: ILO, 1994), para. 185
[67] CEACR, General Survey (Geneva: ILO, 1994), para. 184.
[68] CEACR, General Survey (Geneva: ILO, 1994), para. 184.

complaints. In rendering its views, the CFA often makes reference to the terms of various Conventions, including Conventions that the state in question has failed to ratify, but it does not do so in ways that suggest that a state owes obligations under a Convention that it has not ratified. Instead, it makes reference to Conventions to illuminate the nature and scope of the principles of freedom of association that it is charged with promoting.

73. One such principle, according to the CFA, is that the right of workers to establish and join organizations of their own choosing in full freedom cannot be said to exist unless such freedom is fully established and respected in law and fact.[69] What it means for such freedom to be fully established in law and fact entails a multi-faceted understanding of the many features that the CFA has identified as constitutive of the right of workers to establish and join organizations of their own choosing. Four features of the right are relevant to these proceedings.

74. First, the right contemplates the effective possibility of forming organizations independent of, or in addition to, those which already exist. In *Nigeria* (1999), for example, the Committee noted with concern legislation that provided that no trade union shall be registered to represent workers or employers in a place where there already exists a trade union.[70] Stating that the existence of an organization in a determined occupation should not constitute an obstacle to the establishment of another organization, if the workers so wish, the CFA urged "the Government to amend its legislation so as to ensure that workers may belong to the union of their own choosing at all levels."[71]

75. Second, the right of workers to establish and join organizations of their own choosing prohibits governments from establishing a trade union monopoly by permitting only one organization in the area in which a worker carries on his or her occupation.[72] In *Iraq* (2005), the CFA noted that, while it is generally to the advantage of workers and employers to avoid the proliferation of competing organizations, a monopoly situation imposed by law is at variance with the principle of free choice of workers' organizations.[73] In its view:

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[69] CFA Digest, para. 309. See 302nd Report, Case No. 1825 (Morocco), para. 491 (1996); 304th Report, Case No. 1712 (Morocco), para. 376 (1997); 318th Report, Case No. 1978 (Gabon), para. 217 (2002); 325th Report, Case No. 2109 (Morocco), para. 460 (2006); 333rd Report No. 2133 (Former Yugoslav Republic of Macedonia), para. 59 (2004); 337th Report No. 2388 (Ukraine), para. 1353 (2008).
[70] 315th Report, Case No. 1935 (Nigeria) (1999).
[71] 315th Report, Case No. 1935 (Nigeria), para. 21 (1999).
[72] CFA Digest, para. 324.
[73] 338th Report, Case No. 2348 (Iraq) (2005).

> [w]orkers should be free to choose the union which, in their opinion, will best promote their occupational interests without interference by the authorities. In this respect, the right to establish and to join organizations "of their own choosing," contained in Convention No. 87, is in no way intended as an expression of support either for the idea of trade union unity or for that of trade union diversity. It is intended to convey, on the one hand, that in many countries there are several organizations among which the workers or the employers may wish to choose freely and, on the other hand, that workers and employers may wish to establish new organizations in a country where no such diversity has been found. This diversity should remain possible in all cases. Therefore, any governmental attitude involving the "imposition" of a situation of monopoly would be contrary to the basic principles of freedom of association and measures taken against workers because the attempt to constitute organizations outside the official trade union organization would be incompatible with the above principle.[74]

76. Third, the right of workers to establish and join organizations of their own choosing prohibits governments from placing one organization at an advantage or at a disadvantage in relation to other organizations.[75] This is because "by giving preferential treatment to a given organization, a government may directly or indirectly influence the choice of workers regarding the organization to which they intend to belong, since they will undeniably want to belong to the union best able to serve them, even if their natural preference would have led them to join another organization for occupational, religious, political or other reasons."[76] Thus, in *Japan* (2002), the CFA noted with concern that governmental authorities gave preferential treatment to one workers' organization at the expense of another by appointing systematically members of the former to various councils and commissions, in spite of the fact that the latter represented a large number of workers.[77] In *Cameroon* (1998), the CFA noted that such "discrimination by such methods, or by others, may be an informal way of influencing the trade union membership of workers;"[78] "[w]hile "sometimes difficult to prove. ... [t]he fact, nevertheless, remains that any discrimination of this kind jeopardizes the right of workers set out in Convention No. 87, Article 2, to establish and join organizations of their own choosing."[79]

77. Fourth, the dissolution of an organization or the cancellation of registration of an organization whether by legislative, executive or administrative means, is a violation of the right

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[74] 338th Report, Case No. 2348 (Iraq), para. 995 (2005).
[75] CFA Digest, para. 339.
[76] CFA Digest, para. 339.
[77] 328th Report, Case No. 2139, para. 445.
[78] 311th Report, Case No. 1969, para. 146.
[79] 311th Report, Case No. 1969, para. 146.

of workers to establish and join organizations of their own choosing in full freedom.[80] In *Thailand* (2002), for example, government authorities revoked the registration of an organization representing workers in a public company on the grounds that the legal personality of the company had changed to that of a private company, requiring the union to be newly organized, in accordance with collective bargaining legislation covering the private sector.[81] The CFA stated that "[m]easures of dissolution by administrative authorities constitute serious infringements of the principles of freedom of association; the dissolution of trade union organizations is a measure which should occur only in extremely serious cases, and only following a judicial decision so that the rights of defence are fully guaranteed; the cancellation of an organization by the Registrar of trade unions is tantamount to the dissolution by administrative authority;" that "deregistration measures, even when justified, should not exclude the possibility of a union application for registration to be entertained once a normal situation has been re-established;" and that legislation that provides government authorities with "complete discretionary power to order the cancellation of the registration of a trade union, without any right of appeal to the courts, is contrary to the principles of freedom of association".[82] The CFA therefore requested the government to take appropriate measures to restore the legal personality and registration of the organization, if necessary by transferring these rights under collective bargaining legislation covering the private sector.

5. Conclusions

78. Insofar as the *Act* does not contemplate the effective possibility of forming organizations independent of, or in addition to, those which already exist in health authorities in Nova Scotia or which will exist as a result of the *Act*, it violates the right of workers to establish and join organizations of their own choosing as guaranteed by Convention No. 87, to which Canada is party.

79. Insofar as the *Act* establishes trade union monopolies by stipulating that each union may represent only one of the four bargaining units for a health authority, and must represent the same type of bargaining unit for each health authority, it violates the right of workers to establish

[80] CFA Digest, paras. 685, 690.
[81] 329th Report, Case No. 2181 (Thailand).
[82] 329th Report, Case No. 2181 (Thailand), para. 761.

and join organizations of their own choosing as guaranteed by Convention No. 87, to which Canada is party.

80. Insofar as the *Act* effectively places one or more unions at a disadvantage in relation to the others by redistributing representation rights among the four unions to the benefit of some unions and to the detriment of other unions, it violates the right of workers to establish and join organizations of their own choosing as guaranteed by Convention No. 87, to which Canada is party.

81. Insofar as the *Act* effectively amounts to the dissolution of an organization or organizations or the cancellation of registration of an organization or organizations, whether by legislative, executive or administrative means, it violates the right of workers to establish and join organizations of their own choosing as guaranteed by Convention No. 87, to which Canada is party.

B. Other international and regional instruments

82. As detailed in this section, jurisprudence emanating from other international and regional human rights institutions reveals a similar approach to freedom of association, albeit not at the level of specificity provided by ILO bodies.

1. The United Nations

83. At the heart of international human rights law is the Universal Declaration of Human Rights of 1948, a unanimous resolution of the UN General Assembly in December of the same year. Article 20(1) of the Universal Declaration affirms that "[e]veryone has the right to … freedom of association," and Article 23(4) affirms that "[e]veryone has the right to form and join trade unions for the protection of his interests."

84. Many if not all of the rights enshrined in the Universal Declaration, including Article 23(4), are rendered binding at international law by several treaties overseen and monitored by United Nations institutions. Each of these treaties establishes a specialized body charged with the oversight of treaty performance, and imposes regular reporting obligations on state parties to promote a dialogue between each state and the relevant treaty body, in the expectation that such measures will lead to progressive improvements in compliance. Some of these treaties allow for

individual complaints to be heard by a treaty monitoring body that possesses the authority to express its views on whether a state is in breach of its treaty obligations.[83]

(a) The International Covenant on Economic, Social and Cultural Rights

85. Of these UN treaties, two are relevant to the status of the right to form and join a union. The first, the ICESCR, to which Canada is party, came into force in 1976.[84] Article 8(1)(a) of the ICESCR protects the right to form and join trade unions for the promotion and protection of their economic and social interests. Article 8(1)(b) provides that trade unions have the right to form national or international federations. Article 8(1)(c) enshrines the right of trade unions to function freely. Article 8(1)(d) guarantees the right to strike. Although Article 8(2) authorizes "the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State," the Committee on Economic, Social and Cultural Rights ("CESCR") has consistently required states to justify restrictions of Article 8 rights.[85]

86. The CESCR has made it clear that Article 8(1)(a) protects workers against restrictions on the right to form trade unions, such as requirements to form new independent unions,[86] unduly narrow legal criteria,[87] and registration delays.[88] It has recommended that obstacles to the creation of unions be removed, and called on states to guarantee the possibility of multiple trade unions.[89] In *Nigeria* (1998), for example, the CESCR expressed concern when governmental authorities decreased the number of unions from forty-two to twenty-nine, dissolving some unions and appointing administrators to others.[90]

87. Article 8(3) of the ICESCR provides that

> Nothing in this Article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the

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[83] See generally P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000).
[84] There are currently 160 state parties to the ICECSR. Canada acceded to the ICESCR by Order in Council dated May 18, 1976.
[85] See, e.g., CESCR, Concluding Observations: Canada, E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 (22-05-2006).
[86] See e.g., CESCR, Concluding Observations: Algeria, E/C.12/1Add.71 (30 November (2001).
[87] See, e.g., CESCR, Concluding Observations: Croatia, E/C.12/1/Add.73 (5 December (2001).
[88] See, e.g., CESCR, Concluding Observations: Kenya, E/C/12/KEN/CO/1 (1 December (2008).
[89] Rwanda, CESCR, E/1989/22 (1989) 36 at para. 190.
[90] CESCR, Concluding Observations: Nigeria, E/C.12/1/Add.23 (16 June 1994).

> Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

By preventing states from relying on Article 8 to prejudice rights enshrined in ILO Convention No. 87, Article 8(3) comes close to effectively incorporating Convention No. 87 rights into the guarantee of freedom of association in the ICESCR, at least as it relates to states party to Convention No. 87.

(b) The International Covenant on Civil and Political Rights

88. The second UN treaty of relevance is the ICCPR., to which Canada is also party.[91] The ICCPR is accompanied by a Protocol that authorizes the UN Human Rights Committee ("HRC") to hear complaints from individuals or governments regarding the failure of signatory states to effectively protect the rights enshrined in the Covenant. Article 22(1) of the ICCPR provides that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." The armed forces and police are not protected by this provision. Restrictions of freedom of association may be imposed for reasons of "national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." The ICCPR, like the ICESCR, contains a provision, Article 22(4), preventing states from relying on the guarantee of freedom of association to prejudice rights enshrined in ILO Convention No. 87.[92]

89. The HRC has made it clear that Article 22 protects the right to form and join a union. In its 1999 Concluding Observations on Canada, for example, the HRC stated that Canada "has not secured throughout its territory freedom of association," noting in particular that Ontario's "workfare" program, which prohibits participants "from joining unions and bargaining collectively, affects implementation of Article 22."[93] Similarly, in its 1999 Concluding Observations on Chile, the HRC advised Chile to "review the relevant provisions of laws and

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[91] There are currently 165 state parties to the ICCPR. Canada acceded to the ICCPR by Order in Council dated May 18, 1976.

[92] For commentary, see Lee Swepston, "Human Rights Law and Freedom of Association: Development through ILO supervision (1998) Int. Lab. Rev. 169, at 172 ("entire legislative conformity is guaranteed with Convention No. 87 in this remarkable provision").

[93] CCPR/C/79/Add.105 (06-04-1999), para. 17.

decrees in order to guarantee to civil servants the rights to join trade unions and to bargain collectively, guaranteed under article 22 of the Covenant."[94]

90. The HRC has also made it clear that Article 22 protects workers against restrictions on the right to form trade unions, such as a refusal to recognize a union.[95] It has recommended that obstacles to the creation of unions be removed, and called on states to guarantee the possibility of multiple trade unions.[96]

2. Developments in Europe

(a) The European Convention on Human Rights

91. The European Convention on Human Rights is a regional treaty creating legally binding obligations for contracting parties. It was adopted in 1950 within the framework of the Council of Europe. More than 40 European states belong to the Council of Europe, which was founded in 1949 to promote democracy, the rule of law and greater European integration. The Council is located in Strasbourg and has two political institutions, the Committee of Ministers, and the Parliamentary Assembly, which is drawn from national parliaments. Strasbourg is also home to the European Court of Human Rights, which is charged with interpreting the European Convention and other Council of Europe instruments. Until 1990, membership was essentially confined to western European countries. Finland joined in 1990, followed by numerous eastern European countries, including Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia, Romania, and Latvia. The Council of Europe is also responsible for the adoption of the European Social Charter, as well as the European Convention for the Prevention of Torture, the Framework Convention for the Protection of National Minorities, and the European Charter for Regional or Minority Languages.[97]

92. Article 11 of the European Convention on Human Rights provides that "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the

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[94] CCPR/C/79/Add.104. (30-03-1999), para. 25.
[95] Argentina, CCPR/C/ARG/CO/4 (31 March 2010).
[96] Brazil, ICCPR, A/51/40 vol. I (1996) 44 at para. 334. Rwanda, ICESCR, E/1989/22 (1989) 36 at para. 190.
[97] The European Union is a much smaller and more economically and politically integrated organization than the Council of Europe. The European Union is comprised of the European Parliament, and various Councils and Committees. There are fifteen members of the EU; all 15 are also members of the Council of Europe. As is well known, the European Union is undergoing a contentious process of enlargement as central and eastern European states are seeking admission into the EU. The European Union has a judicial institution, the European Court of Justice, responsible for interpreting and applying EU law.

right to form and to join trade unions for the protection of his interests." In *National Union of Belgian Police v. Belgium*, the European Court of Human Rights ("ECtHR") held that the words, "for the protection of his interests" in Article 11, "clearly denoting purpose, show that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible."[98]

93. Until recently, the ECtHR had interpreted Article 11 restrictively, at least with respect to trade union protections. It held that freedom of association as set out in Article 11 included a right to form and join a trade union and to be represented by a union but did not include a right to bargain collectively or strike to secure the interests of workers.[99] At the same time, the ECtHR had been actively promoting an interpretation of freedom of association that protected an individual's right not to belong to a union.[100]

94. In *Wilson v. United Kingdom*,[101] however, an employer announced that it would provide a backdated wage increase to employees who signed an individual contract before the expiry of their collective agreement. In the name of flexibility, the UK had recently amended its labour law regime to excuse such an action in cases where an employer was seeking to introduce a change in its formal relationship with its unionized workers. The ECtHR held that the state's failure to prevent employers from engaging in this kind of activity violates Article 11.

95. According to the ECtHR in *Wilson*,

> the words "for the protection of his interests" in Article 11§1 are not redundant, and the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard.[102]

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[98] Application no. 4464/70 (27 October 1975).
[99] *Schmidt and Dahlstrom v. Sweden* (1975) 1 EHRR 637; *Swedish Engine Drivers" Union v. Sweden* (1975) 1 EHRR 617.
[100] See *Young, James and Webster v. UK* (1981) 4 EHRR 38; *Sigurjonsson v. Iceland* (1993) 16 EHRR 462; *Gustafsson v. Sweden* (1996) 22 EHRR 409.
[101] *Wilson v. United Kingdom* (2002) 35 EHRR 523.
[102] *Wilson, ibid,* para. 42.

The ECHR therefore held that a state must enable trade unions to engage in action to protect the interests of workers, and that workers have a right to be heard collectively in order to protect their interests.

96. As a result of *Wilson*, Article 11 protects more than a right to form a union, and extends to core incidents of freedom of association, such as the freedom "to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf."[103]

97. Subsequent to *Wilson*, the Court delivered several decisions referencing freedom of association.[104] None of them, except the following, bear directly on the issues in these proceedings but they do demonstrate that the ECtHR has strengthened the protection that Article 11 extends to workers. Of these decisions, two are especially noteworthy. The first, *Demir and Baykara v. Turkey,* was delivered on 12 November 2008.[105] *Demir and Baykara* concerned the failure of Turkey to enact legislation securing for public sector employees the right to form a union and bargain collectively. Public sector employees of a Turkish municipal council had in fact formed a union and entered into a collective agreement with the municipal council that regulated all aspects of the employees' working conditions, including salaries, allowances and welfare services. When the municipal council failed to fulfil certain financial obligations under the collective agreement, the union took the municipal council to court. Noting that Turkish legislation did not appear to permit municipal employees to form a union, Turkish courts held the union to have no legal personality and thus annulled the terms and conditions of the collective agreement.[106]

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[103] *Ibid.*

[104] In addition to *Demir and Baykara v. Turkey* and *Enerji Yapi-Yol Sen v. Turkey*, discussed below, see *Sørensen and Rasmussen v. Denmark [GC],* nos. 52562/99 and 52620/99 ECHR 2006-I (Danish law did not comply with Article 11 as it permitted closed shop agreements allowing an employer to require an employee to be member of a specific association in order to obtain employment); *Tüm Haber Sen and Çınar v. Turkey,* no. 28602/95, ECHR 2006-II (dissolution of Turkish public service union could not be justified by an absolute statutory prohibition of the forming of trade unions by civil servants and public service contract workers); *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, ECHR 2007-III (Employment Appeal Tribunal decision compelling British trade union to re-admit union member who had been expelled for his far-right political affiliation violated Article 11); *Danilenkov and Others v. Russia*, no. 67336/01, 30 July 2009 (Article 11 violated on account of Russian authorities" failure to provide effective and clear judicial protection against discrimination on the grounds of trade union membership).

[105] Application No. 34503/97.

[106] *Ibid.*, at paras. 16-17.

98. On appeal to the ECtHR, the Grand Chamber held that Article 11 of the European Convention not only protected the right of public sector employees to form a trade union but also the right to bargain collectively. It held that the failure of Turkey to legislate provisions conferring legal personality on the union in question violated the employees' right to form and join a union, and the subsequent annulment of the collective agreement violated the employees' right to bargain collectively. In reaching its decision with respect to the right to collective bargaining, the Court reviewed the case law on the right of association. This included the position in *Wilson* that "even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members' interests."[107]

99. The ECtHR summarized the jurisprudence to date as recognizing that freedom of association encompasses a right to form and join a trade union, a prohibition of closed-shop agreements, and the right of a trade union to seek to persuade the employer to hear what it has to say on behalf of its members.[108] It held this jurisprudence to manifest two guiding principles:

> [F]irstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance.[109]

It then expressed a willingness to expand the list of rights available under Article 11 by interpreting it "in the light of present day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights."[110]

100. Upon reviewing ILO Conventions Nos. 87, 98, and 151, the views of the ILO's Committee on Freedom of Association, the European Social Charter, the European Union's Charter of Fundamental Rights, as well as the practice of European States, including Turkey, the ECtHR concluded:

> In the light of these developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute

[107] *Demir and Baykara*, at para. 143.
[108] *Ibid.*, at para. 145.
[109] *Ibid.*, at para. 144.
[110] *Ibid.*, at para. 146.

> an inherent element of Article 11 should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems.... Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.[111]

The ECtHR explicitly added that this right applied to civil servants.[112]

101. Moreover, having found that the Turkish government breached Article 11 rights, the ECtHR applied its test for whether the interference was justified, derived from Article 11(2). This was articulated as being that the violation "was 'prescribed by law', that it pursued one or more legitimate aims, in accordance with paragraph 2 [of Article 11], and that it was 'necessary in a democratic society' to fulfil such aims."[113] The ECtHR concluded that the breach was not justified.

102. The second decision of note is *Enerji Yapi-Yol Sen v. Turkey*,[114] delivered on 21 April 2009, in which the ECtHR held that Article 11 enshrined a right to strike as an essential corollary of the right to form and join a trade union. *Enerji Yapi-Yol Sen* involved a state prohibition on public sector trade unions from taking industrial action. Members of the trade union Enerji Yapi-Yol Sen who ignored the prohibition were disciplined, and the union alleged that the ban on strikes interfered with their right to form and join trade unions as guaranteed under Article 11. The ECtHR acknowledged that the right to strike could be limited, in a proportionate manner, in the case of certain categories of public servants when the state is confronted with a "pressing social need." However, it held that a ban applied to all public servants was too wide a restriction. The ECtHR held that the disciplinary action was "capable of discouraging trade union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at defending their members' interests" and amounted to a threat to rights guaranteed under Article 11. The strike ban was not in response to a "pressing social need" and

[111] *Ibid.*, at para. 153-154 (citations omitted).
[112] *Ibid.*, at para. 154.
[113] *Ibid.*, at para. 159.
[114] Application No. 68959/01.

the Turkish government had thus failed to justify the need for the impugned restriction in a democratic society.

(b) The European Social Charter

103. The European Social Charter is a regional treaty creating legally binding obligations on contracting parties. It was adopted in 1961 within the framework of the Council of Europe. Article 5 of the European Social Charter establishes the right to organize. Under Article 5, contracting parties undertake to ensure that national law not impair or be applied to impair the "freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join these organizations." Excepted groups are police and armed forces, whose freedoms are left solely to national laws or regulations. Article 5 of the Charter applies to all other public employees.

104. The European Committee on Social Rights ("ECSR"), the Social Charter's monitoring body, has held that Article 5 requires states to ensure that workers who form or join a union must be free in law to form or join one "of their own choice." The ECSR held Denmark to be in breach of Article 5 because it had stipulated that collective agreements negotiated by Danish unions concerning vessels on the Danish International Shipping Register applied only to sailors who were resident in Denmark, which the ECSR viewed as a restriction on the right to "choose" a union because affected workers would feel the need to join a non-Danish union.[115]

105. The ECSR has also made it clear that Article 5 protects workers against restrictions on the right to form trade unions, such as a refusal to recognize a union with fewer than a specified number of members,[116] and a refusal to recognize a union representing certain classes of workers, such as civil servants and homeworkers,[117] security intelligence personnel,[118] police,[119] nationals,[120] and retired and unemployed persons.[121] In *Moldova* (2010), the ECSR held that a requirement that trade unions not operating nationwide must belong to a national, sectoral or

[115] C XII-1 110-1 (Denmark), C XIII-3 97 (Denmark).
[116] C XIX-3 (Latvia); C 2010 (Georgia).
[117] C XIX-3 (Poland).
[118] C XIX-3 (Czech Republic).
[119] C 2010 (Albania); C 2010 (Armenia).
[120] C 2010 (Bulgaria).
[121] C XVIII-1 Vol. 2 (Poland).

inter-sectoral trade union in order to acquire legal personality unduly restricts the right to form trade unions as guaranteed by Article 5.[122]

3. Conclusions

106. In summary, jurisprudence emanating from other international and regional human rights institutions reveals a similar approach to freedom of association, albeit not at the level of specificity provided by ILO bodies. Specifically, they manifest a common approach to the right to join and form a union, one that sees the right as an incident of freedom of association, and which:

- contemplates the effective possibility of forming organizations independent of, and in addition to, those which already exist;
- prohibits governments from establishing a trade union monopoly by permitting only one organization in the area in which a worker carries on his or her occupation;
- prohibits governments from placing one organization at an advantage or at a disadvantage in relation to other organizations; and
- prohibits governments, whether by legislative, executive or administrative means, from dissolving an organization or cancelling the registration of an organization.

107. Section 89(1) and related provisions of the *Act*, which require the arbitrator to: (1) establish four bargaining units of unionized employees for each health authority, namely, a nursing bargaining unit (which is to include registered nurses and licensed practical nurses), a health care bargaining unit, a clerical bargaining unit, and a support bargaining unit; (2) ensure that each union represent only one of the four bargaining units for a health authority and represent the same type of bargaining unit for each health authority; and (3) restrict eligibility to represent a bargaining unit to unions that previously represent unionized employees in a bargaining unit of the same type for at least one district health authority, interfere with the right of workers to form and join a union enshrined in the international and regional instruments canvassed in this Part.

108. Specifically,

- insofar as the *Act* does not contemplate the effective possibility of forming organizations independent of, or in addition to, those which already exist in health authorities in Nova

[122] C 2010 (Moldova).

Scotia or which will exist as a result of the Act, it violates the right of workers to form and join a union as guaranteed by the ICESCR and the ICCPR, to which Canada is party, and is inconsistent with the European Convention on Human Rights and the European Social Charter.

- insofar as the *Act* establishes trade union monopolies by stipulating that each union may represent only one of the four bargaining units for a health authority, and must represent the same type of bargaining unit for each health authority, it violates the right of workers to form and join a union as guaranteed by the ICESCR and the ICCPR, to which Canada is party, and is inconsistent with the European Convention on Human Rights and the European Social Charter.
- insofar as the *Act* effectively places one or more unions at a disadvantage in relation to the others by redistributing representation rights among the four unions to the benefit of some unions and to the detriment of other unions, it violates the right of workers to form and join a union as guaranteed by the ICESCR and the ICCPR, to which Canada is party, and is inconsistent with the European Convention on Human Rights and the European Social Charter.
- insofar as the *Act* effectively amounts to the dissolution of an organization or organizations or the cancellation of registration of an organization or organizations, whether by legislative, executive or administrative means, it violates the right of workers to form and join a union as guaranteed by the ICESCR and the ICCPR, to which Canada is party, and is inconsistent with the European Convention on Human Rights and the European Social Charter.

"EXHIBIT B"

PATRICK MACKLEM, F.R.S.C.
William C. Graham Professor of Law
University of Toronto
78 Queen's Park
Toronto, Canada M5S 2C5
(416) 978-3873
p.macklem@utoronto.ca

I. ACADEMIC HISTORY

A. Educational and Professional History

2006-	William C. Graham Professor of Law, University of Toronto
2007-2008	Member, Institute for Advanced Study, Princeton, NJ
2006-2007	Senior Global Research Fellow, Center for Human Rights and Global Justice, New York University School of Law
2003	Visiting Scholar, European Law Research Center, Harvard University
2003	Visiting Professor, European University Institute, Italy
2001-	Visiting Professor, Department of Legal Studies, Central European University, Hungary
1999-	Professor of Law, University of Toronto
1993-1999	Associate Professor, Faculty of Law, University of Toronto
1988-1993	Assistant Professor, Faculty of Law, University of Toronto
1992-1993	Visiting Scholar, UCLA School of Law
1991-	Member, Law Society of Upper Canada
Jan.-June 1988	Visiting Scholar, Stanford Law School
Jan.-Dec. 1987	Law Clerk to Chief Justice Brian Dickson, Supreme Court of Canada
1985-1986	Master of Laws, Harvard Law School
1984-1985	Student-at-Law, Cavalluzzo, Hayes & Lennon, Toronto, Ontario
1981-1984	Juris Doctor, Faculty of Law, University of Toronto
1978-1981	Bachelor of Arts (Joint Honours), Philosophy & Political Science, McGill University
1977-1978	Faculty of Arts, American College in Paris

B. Appointments, Fellowships and Grants

2011-2014	Research Partner, "Spanish Transnational Corporations and Human Rights" Spanish Ministry of Science and Technology. (30,000 Euros over three years)
2009-2012	SSHRC Standard Research Grant (63,070 CAD over three years)
2006-2011	Member of Steering Committee, "Indigenous Peoples and Governance," Major Collaborative Research Initiative, Social Sciences and Humanities Research Council of Canada (SSHRC) (2.5 million CAD over 5 years)
2005	College of Reviewers, Canada Research Chairs Program
2003-	Named, Fellow of the Royal Society of Canada
2003-2004	Fulbright New Century Fellowship (65,000 CAD)
2003	SSHRC Standard Research Grant (95,000 CAD over 3 years)

2002	Wright Foundation Scholarship, Summer Assistantship Grant
2001	Wright Foundation Scholarship, Summer Assistantship Grant
1999	Connaught Fellowship, Wright Foundation Scholarship
1998	SSHRC General Research Grant (65,000 CAD over 3 years)
1996	Wright Foundation Scholarship, Faculty SSHRC Research Grant, Faculty of Law Teaching Award
1994	Faculty SSHRC Research Grant
1993	Faculty SSHRC Research Grant
1989	Connaught Fund Phase I, New Staff Grant

II. SCHOLARLY AND PROFESSIONAL WORK

A. Books and Editions

- *The Sovereignty of Human Rights* (New York: Oxford University Press, forthcoming))
- *35@30: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (co-editor) (Toronto: University of Toronto Press, forthcoming)
- *Canadian Constitutional Law* (4th ed.) (executive co-editor) (Toronto: Paul Emond, 2010)
- Guest Editor, *Education, Administration, and Justice: Essays in Honour of Frank Iacobucci* (2007) 57 University of Toronto Law Journal (Special Issue) (with S. Choudhry, D. Schneiderman and Lisa Austin)
- *Labour and Employment Law: Cases, Materials and Commentary* (co-editor) (Kingston: Industrial Relations Centre, Queen's University, 7th ed. 2004)
- Guest Editor, *Liberal Democracy and Tribal Peoples: Group Rights in Aotearoa/New Zealand* (2002) 52 University of Toronto Law Journal (Special Issue)
- *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) (awarded the Canadian Political Science Donald Smiley Award for the best book in 2001 on Canadian government and policy; and the Canadian Federation for the Humanities and Social Sciences 2002 Harold Innis Prize by for the best English-language book in the social sciences)
- *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) (co-editor, with R. Daniels and K. Roach)

B. Articles

- "Human Rights in International Law: Three Generations or One," (2015) 3 *London Review of International Law* (forthcoming)
- "Recognition and Reconciliation in Indigenous-Settler Societies" (with D. Sanderson), in P. Macklem & D. Sanderson (eds), *Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, forthcoming)
- "Indigenous-Canadian Relations and the "Ethos of Legal Pluralism," in P. Macklem & D. Sanderson (eds), *Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, forthcoming)
- "Self-Determination in Three Movements" in F. Tesón (ed.), *The Theory of Self-Determination* (Cambridge: Cambridge University Press, forthcoming)
- "Global Poverty and the Right to Development in International Law," (2014) 1 *London Journal of International Law* 1

- "Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe" (2013) 19 *Constellations* 575-590
- "Race and Ethnicity," Mark Tushnet and Cheryl Saunders (eds), *Routledge Handbook on Constitutional Law* (Routledge: 2012) pp. 313-324
- "Freedom of Association and International Law," in Judy Fudge and Eric Tucker (eds.), *Freedom of Association After Fraser* (Toronto: Irwin Law, 2012) 260-284
- Les droits des minorities en droit international," in H. Ruiz Fabri & M. Rosenfeld (eds), *Repenser le Constitutionalisme à L'Âge de la Mondialisation et de la Privatisation* (Paris: Société de législation comparée, 2011) 233-259
- "A Külső Határok Védelem: Militáns Demokrácia és Vallásszabadság Európában" (2010)(4) *Fundamentum* 27-48 (Hungarian law journal specializing in constitutional law and human rights)
- "The Law and Politics of International Cultural Rights," 16(3) *International Journal on Minority and Group Rights* 481-501 (2009)
- "Distributing Sovereignty: Indian Nations and Equality of Peoples" in T. Campbell (ed.), *The International Library of Essays on Rights* (Aldershot: Ashgate, 2009) (originally published in 45 *Stanford Law Review* 1311-1367 (1993))
- "Humanitarian Intervention and the Distribution of Sovereignty in International Law" 22(4) *Ethics & International Affairs* 369-393 (2008)
- "Indigenous Recognition in International Law" 30(1) *Michigan International Law Journal* 177-210 (2008)
- "Minority Rights in International Law" 6(3-4) *I.CON (International Journal of Constitutional Law)* 531-552 (2008)
- "What is International Human Rights Law? Three Applications of a Distributive Account" 52 *McGill Law Journal* 3-30 (2007); also published as *Occasional Paper No. 31, Institute for Advanced Study* (2008)
- 'Indigeni" in M. Flores, I *Diritti Umani: Cultura dei diritti e dignita della persona nell'epoca della globalizzazione* (Torino: Unione Typographico-Editrice Torinese, 2007) 737-745
- 'Social Rights in Canada,' in D. Barak-Erez & E. Gross (ed.), *Exploring Social Rights* (Oxford: Hart Publishing, 2007) 213-242
- 'The Political Economy of Fairness: The Labour Law Jurisprudence of Frank Iacobucci' (with B. Langille) (2007) *University of Toronto Law Journal* 343-368
- 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination' 4 *International Journal of Constitutional Law* 488 (2006)
- 'The Wrong Vocabulary of Right: Minority Rights and the Boundaries of Political Community,' in A. Sajo (ed.), *The Dark Side of Human Rights* (Netherlands: Eleven International, 2006)
- "New Labour Standards Compliance Strategies: Corporate Codes of Conduct and Social Labeling Programs" (with M. Trebilcock) (Research Report, Federal Labour Standards Review) (2006) online at: http://www.hrsdc.gc.ca/en/labour/employment_standards/fls/pdf/research21.pdf
- 'Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction' *International Law Forum* 7 *International Law Forum* 281 (2005)
- Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law' (2005) 16 *European Journal of International Law* 1
- 'The Right to Bargain Collectively at International Law: Workers' Right, Human Right, International Right?' in P. Alston, ed., *Labour Rights as Human Rights* (Oxford University Press, 2005)
- 'Labour Law Beyond Borders' (2003) 5 *Journal of International Economic Law* 605

- 'Securing Accountability Through Commissions of Inquiry: A Role for the Law Commission of Canada' (with R. Centa) (2002) 39 *Osgoode Hall Law Journal* 117
- 'The Maori Experiment' (2002) 52 *University of Toronto Law Journal* 1
- 'Canada's Obligations at International Criminal Law,' in Daniels et al., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001)
- 'The Probable Impact and Legal Effect of the Upcoming Referendum,' (2001) 3 *British Columbia Advocate* 895
- 'Social Rights, Social Citizenship, and Transformative Constitutionalism: A comparative assessment,' (with D. Davis and G. Mundlak), in Joanne Conaghan, Michael Fischl, Karl Klare, eds., *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002) 511-534
- 'Indigenous Rights and Multinational Corporations at International Law' (2001) 24 *Hastings International and Comparative Law Review* 475
- 'Indigenous Rights in the Inter-American System' (2000), 22 *Human Rights Quarterly* 569-602 (with E. Morgan)
- 'Secondary Picketing, Consumer Boycotts and the Charter' (2000), 7 *Canadian Journal of Labour and Employment Law* 1
- 'From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult' (2000), 79 *Canadian Bar Review* 252-279 (with S. Lawrence)
- 'Fiduciary Law and the British Columbia Treaty Process,' in Pacific Business and Law Institute, *Litigating Aboriginal Claims: Collected Papers* (Conference Proceedings, 1998)
- 'Basic Features of the Constitution of Canada, with an Emphasis on the Canadian Charter and Aboriginal Rights,' in B.V. Lal & T.R. Vakatora, eds., *Fiji and the World* (Suva: University of the South Pacific, 1997)
- 'Aboriginal Rights, State Obligations' (1997), 36 *Alberta Law Review* 97-116
- 'What's Law Got To Do With It? The Protection of Aboriginal Title in Canada' (1997), *Osgoode Hall L.J.* 125-138
- 'The Impact of Treaty 9 on Natural Resource Development in Northern Ontario' in M. Asch ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: University of British Columbia Press, 1997)
- 'Fiduciary Obligation and Residential Schooling: A Case for Redress' (with D. Réaume) (Royal Commission on Aboriginal Peoples, 1995) 95 pp.
- 'Normative Dimensions of an Aboriginal Right of Self-Government' (1995), 21 *Queen's Law Journal* 173-219
- 'North American Indigenous Sovereignty and the 1992 Charlottetown Accord: A Voice From the North' in Donald Grinde Jr. ed., *The Unheard Voices: A Quincentenary Response to Columbus (1492-1992)* (Los Angeles: UCLA American Indian Studies Center, 1994) 165-190
- 'Developments in Employment Law: The 1992-93 Term' (1994), 5(2d) *Supreme Court Law Review* 269-335
- 'Indigenous Peoples and the Canadian Constitution: Lessons for Australia?' (1994), 5 *Public Law Review* 11-34
- 'Developments in Employment Law: The 1991-92 Term' (1993), 4(2d) *Supreme Court Law Review* 279-309
- 'Distributing Sovereignty: Indian Nations and Equality of Peoples' (1993), 45 *Stanford Law Review* 1311-1367
- 'Ethnonationalism, Aboriginal Identities, and the Law', in M. Levin, ed., *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto, 1993) 9-28

- 'Aboriginal Justice, the Distribution of Legislative Authority, and the Judicature Provisions of the Constitution Act, 1867,' in *Aboriginal Peoples and the Justice System* (Royal Commission on Aboriginal Peoples, 1993) 326-358
- 'Developments in Employment Law: The 1990-91 Term' (1992), 3(2d) *Supreme Court Law Review* 227-268
- 'Aboriginal Peoples, Criminal Justice Initiatives and the Constitution' [1992] *University of British Columbia Law Review* 280-305 (Special Edition on Aboriginal Justice)
- 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (with C.Scott) (1992), 141 *University of Pennsylvania Law Review* 1-148
- 'Resorting to Court: Can the Judiciary Deliver Justice for First Nations?' (with R. Townshend), in Engelstad & Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Toronto: Anansi, 1992) 78-87
- 'Developments in Employment Law: The 1989-90 Term' (1991), 2(2d) *Supreme Court Law Review* 347-384
- 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' (1991), 36 *McGill Law Journal* 382-456
- 'Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*' (with M. Asch) (1991), 29 *Alberta Law Journal* 498-517
- 'Developments in Employment Law: The 1988-89 Term' (1990), 1(2d) *Supreme Court Law Review* 405-466
- 'Of Texts and Democratic Narratives' (Review Essay of Hutchinson, *Dwelling on the Threshold*) (1991), 41 *University of Toronto Law Journal* 114-145
- 'Property, Status and Workplace Organizing' (1990), 40 *University of Toronto Law Journal* 74-108
- 'Constitutional Ideologies' (1988), 20 *Ottawa Law Review* 117-156
- 'Beyond Belief: Labour Law's Duty to Bargain' (with B. Langille) (1988), 13 *Queen's Law Journal* 62-102
- '*Re Skapinker* and the Mootness Doctrine' (with E. Gertner) (1984), 6 *Supreme Court Law Review* 369-385
- 'Freedom of Conscience and Religion in Canada' (1984), 42 *University of Toronto Faculty of Law Review* 50-81

C. Book Reviews

- S. Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* 20(2) *Great Plains Research* 268 (2010)
- P. Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (2008), 64(4) *International Journal* 1166-69
- L. Drees, *The Indian Association of Canada: A History of Political Action* (Vancouver: UBC Press, 2002), *University of Toronto Quarterly* vol 73:1
- R. Moon, *The Constitutional Protection of Freedom of Expression* (2001) 71 *University of Toronto Quarterly* 1
- Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press/Osgoode Society for Legal History, 1998), 69(1) *University of Toronto Quarterly* (1999) 232-234
- Leon Trakman, *Reasoning With the Charter* (1992), 24 *Ottawa Law Review* 289-296

- Leo McGrady, *A Guide to Organizing Unions* (1991), 44 *Industrial & Labor Relations Review* 761-763

D. Conference and Symposia Presentations (since 2004)

- Paper presentation, "Indigenous Rights in Canadian Constitutional Jurisprudence," Frontiers of Constitutional Jurisprudence in China and Canada, Tsinghua University, Bejing, October 2013
- Paper Presentation, "Indigenous-Canadian Relations and the "Ethos of Legal Pluralism," Indigenous Peoples' Sovereignty and the Limits of Judicial and Legal Pluralism, University of Trento, Italy, October 2013
- Paper Presentation, "Global Economy and the Rule of Law in a Changing World, World Juris Association Annual Conference, Tel Aviv, Israel, June 1013
- Paper Presentation, "Guarding the Perimeter: Miltant Democracy and Religious Freedom in Europe," Conference on National Minorities in Europe, The Kenan Institute for Ethics, Duke University, April 2013
- Paper Presentation, "Formal and Substantive Recognition in International Law and the Politics of Indigenous Rights," International Expert Seminar on Access to Justice for Indigenous Peoples, Columbia University, New York, February 2013
- Panel chair, Lessons Learned from the Canadian Residential Schools Context" University of Toronto, January 2013
- Paper presentation, "Minority Rights in Canada," Democracy and Recognition Seminar, Social Science Research Institute, Universidad Diego Portales, Santiago Chile, December 2012
- Co-Organizer (with D. Sanderson), 35@30: Reflecting on 30 Years of Section 35 of the Constitution Act, 1982, University of Toronto, October 2012
- Paper presentation, "The International Constitution," Frontiers of Constitutional Jurisprudence in China and Canada, University of Toronto, October 2012
- Paper presentation, "Bora Laskin and the Origins of Post-Dualism," Beetz-Laskin symposium, Université de Montreal, September 2012
- Paper Presentation, Militant Democracy Workshop, Center for Human Values, Princeton University, April 2010
- Panel Chair, Conference on Freedom of Association: Harmonizing Canadian Norms with International Commitments, University of Saskatoon, February 2010
- Panel Chair, Symposium on The Right to Strike in Canada, University of Toronto, December 2009
- Roundtable Participant, "The Law and Politics of International Cooperation" Vanderbilt Law School, Nashville, TN, April 2009
- Paper Presentation, "International Indigenous Rights," 60th Anniversary of the Universal Declaration of Human Rights, Trudeau Foundation and the Association for Canadian Studies, McGill University, December 2008
- Paper Presentation, "Indigenous Recognition in International Law: Theoretical Observations," Indigenous Peoples and Governance, Université de Montreal, October 2008
- Paper Presentation, "Indigenous Recognition in International Law: Theoretical Observations," University of Victoria, British Columbia, March 2008
- Paper Presentation, "What is International Human Rights Law?" Program in Law and Public Affairs, Princeton University, November 2007
- Paper Presentation, "What is International Human Rights Law?" Rapoport Center for Human Rights and Justice, University of Texas at Austin, November 2007

- Paper Presentation, "Human Rights as Reparations," Institute for Advanced Study, Princeton, November 2007
- Paper Presentation, "Minority Rights in International Law," Conference on Constitutionalism in an era of Globalization and Privatization, La Sorbonne, Paris, October 2007
- Keynote Address, 'Policing Power: First Nations and the Constitution of Authority' Conference on 'Balancing Aboriginal Perspectives, Policing, Challenges, Responses' (jointly organized by the Royal Canadian Mounted Police and Cape Breton University), April 2007
- Annual Lecture, 'What is International Human Rights Law?', McGill Law Journal, Montreal, February 2007
- Paper Presentation, 'What is International Human Rights Law?' Floersheimer Center Legal Theory Colloquium and Speaker Series (jointly organized by Cardozo Law School, the New School for Social Research and Columbia University), New York, January 2007
- Paper Presentation, 'Humanitarian Intervention and the Distribution of Sovereignty in International Law,' Global Fellows Forum, NYU School of Law, September 2006
- Paper Presentation, 'Humanitarian Intervention and Coercion in International Law,' 2006 Galilee Colloquium on Moral and Political Theory, Israel, June 2006
- Paper Presentation, 'Soft Labour Law,' Cardozo Law School Workshop, November 2005
- Paper Presentation, 'The UN Special Rapporteur's 2004 Report on Canada and the Politics of Residential Schools Redress,' United Nations Expert Seminar on Implementation of National Legislation and Jurisprudence concerning Indigenous Peoples' Rights, University of Arizona in Cooperation with the Office of the United Nations High Commissioner for Human Rights, October 2005
- Paper presentation, 'Minority Rights and the Boundaries of Political Community,' 13th Annual Conference on The Individual and the State Central European University, Budapest, June 2005
- Paper presentation, 'Legal Pluralism and Militant Democracy, Conference on Emerging Legal Issues for Islam in Europe, Central European University, Budapest, June 2005
- Paper presentation, 'Labour Rights in International Law,' Workshop on the Boundaries of Labour Law Protection, Bellagio, May 2005
- Paper Presentation, 'Indigenous Rights and the Boundaries of Political Community,' IV Encuentro de investigadores e inverstigadoras sobre los derechos de los pueblos indígenas, University of Girona, October 2004
- Panelist, Aboriginality and Governance Colloquium, Université de Montreal, October 2004
- Organizer, Chair and Panelist, Workshop on Arar Commission, University of Toronto. April 2004
- Panelist, 'Indigenous Peoples in International Fora' University of Michigan Law School March 2004
- Panelist, 'Militant Democracy' 11th Annual Conference on The Individual vs. The State, Central European University, Budapest, December 2003

E. Editorial contributions

- Editorial Associate, *Constellations: An International Journal of Critical and Democratic Theory* (2013-)
- Editorial Board Member and founding Faculty Advisor, *Indigenous Law Journal* (2002-)
- Editorial Board Member, *University of Toronto Law Journal* (1999-)
- Editorial Board Member, *Review of Constitutional Studies* (1997 -)

- External reviewer for several domestic and foreign academic presses, including Oxford University Press, and numerous journals and law reviews

III. TEACHING RESPONSIBILITIES (since 2000)

2008-ongoing	International Law; Constitutional Law; Human Rights and Global Justice
2006-2008	Sabbatical; on leave
2005-2006	Constitutional Law; Advanced Human Rights Law: Social Justice Beyond the State; Constitutional Theory
2004-2005	Constitutional Law; Labour Policy
2003-2004	Sabbatical
2003	Labour Rights as International Rights (European University Institute)
2002-ongoing	Comparative Federalism (Central European University)
2001-ongoing	International Human Rights Law (Central European University)
2000-2003	Constitutional Law; Labour Law; International Human Rights Law; First Nations and the Law

IV. GRADUATE SUPERVISION (since 2000)

I supervised to completion 24 LL.M. students, and was a second reader for 12 additional LL.M. students. I expect to supervise 3 new LL.M. students this academic year. I also supervised to completion 14 S.J.D. students, was a member of 12 additional S.J.D. (or Ph.D.) supervisory committees, and served on 17 examination committees (7 external to my Faculty). I am currently supervising 2 S.J.D. students, and I expect to supervise 1-2 new S.J.D. students this academic year. I also supervised 30 J.D. directed research papers and 44 J.D. extended papers. I also supervised to completion 10 LL.M. students and 4 S.J.D. students at Central European University, and I am currently supervising 2 LL.M. students at that institution. Undergraduate and graduate students have been involved as research assistants in all internal and external grants to date. I have also co-authored two articles with students (Centa and Macklem 2002; Lawrence and Macklem 2000).

V. SELECT COMMUNITY AND ADVISORY WORK

- Expert witness on sovereign immunity in international law, *Tracey et al. v. Iran*, currently before the Ontario Superior Court of Justice, ongoing
- Founder, *The InJustice Project*: an NGO monitoring Canada's compliance with its obligations to protect Indigenous and social rights. For more information, visit its Facebook page: http://www.facebook.com/pages/The-InJustice-Project-advocating-for-indigenous-justice/285421587179. Activities to date include:
  - Co-counsel for Mohawks of the Bay of Quinte, the Oneida Nation of the Thames, Wikwemikong First Nation, and Six Nations of the Grand River in a complaint before the Canadian Human Rights Commission alleging discrimination on the basis of national or ethnic origin; currently before the Federal Court of Appeal;
  - Co-counsel for appellant, in litigation contesting a decision by the Registrar to strike a status Indian from the federal Indian Registry, currently before the Federal Court

  - Counsel for complainant in an communication before the United Nations Special Rapporteur on the Rights of Indigenous Peoples concerning Indigenous poverty and Canada's international legal obligations
  - Co-counsel, representing the Kapuskasing Cree First Nation before the Federal Court in *Kapuskasing Cree First Nation v. A.G. Ont.*, currently before the Ontario Superior Court of Justice
  - Co-counsel, representing the Assembly of First Nations before the Supreme Court of Canada in *William v. A.G.B.C.*, 2013
  - Co-counsel, in cases in Alberta and Ontario, on Aboriginal and treaty rights and tobacco production and distribution 2013
- Expert Witness on labour rights in international law, constitutional litigation commenced by International Association of Machinists and Aerospace Workers and Air Canada Pilots Association 2012-13
- Expert Witness on labour rights in international law, constitutional litigation commenced by the British Columbia Teachers Union 2012
- Expert Witness on labour rights in international law, constitutional litigation commenced by the Public Service Alliance of Canada, 2010-11
- Expert Witness on labour rights in international law, constitutional litigation commenced by the Professional Institute of the Public Service of Canada, 2009
- Expert Witness on labour rights in international law, constitutional litigation commenced by National Union of Public and General Employees, 2010
- Legal Advisor, Gwich'in Tribal Council, on the constitutionality of NWT devolution
- Legal advisor, British Columbia Health Employees Union, constitutional challenge to provincial legislation restricting public sector collective bargaining, 2005
- Legal advisor, Rama First Nation, 2005
- Legal advisor, challenge to statutory monopoly of the Canada Post Corporation, 2005
- Legal advisor, Inuvialuit Development Corporation, constitutionality of Mackenzie Gas Pipeline, 2004
- Co-counsel, Assembly of First Nations, *Awas Tingni v. Republic of Nicaragua*, Inter-American Court of Human Rights, 1999-2000
- Legal advisor, Government of British Columbia, defending constitutional challenge to the Nisga'a Final Agreement, 1998-2001
- Legal Advisor, Committee for a Public Inquiry Into the Death of Dudley George, 1998
- Legal advisor, Greater Slave Lake Regional Council, constitutional challenge to the *Indian Act* voting requirements, 1997-98
- Legal advisor, Alliance Tribal Council, 1997-98
- Legal advisor, legal challenge on election requirements for the position of chief in the *Indian Act*, 1996
- Legal advisor, British Columbia Treaty Commission, 1996
- Legal advisor, Committee of Experts on the Constitution of South Africa, 1996
- Legal advisor, Royal Commission on Aboriginal Peoples, 1993-1996, on all matters bearing on the constitutional relationship between First Nations and the Canadian state
- Legal advisor, Fiji Constitution Review Commission, 1995
- Legal advisor, on Aboriginal self-government treaty negotiations and constitutional issues, Government of British Columbia, Fall 1993
- Legal advisor, on the constitutionality of the North American Free Trade Agreement, Government of Ontario, Fall 1993

- Legal advisor, on constitutionality of B.C *Labour Relations Code*, United Food and Commercial Workers Union, Spring 1993
- Legal advisor, on labour law reform, Committee on Broader Based Bargaining, Ontario, Winter 1992 (pro bono)
- Legal advisor, on labour law reform, Committee of Special Advisors, Ministry of Labour, Government of British Columbia, Summer 1992
- Legal advisor, on Aboriginal rights and governmental fiduciary obligations, Task Force on Kemano Completion Project, Government of British Columbia, Summer 1992
- Legal advisor, on *Delgamukw v. A.G.B.C.* appeal, Attorney General of British Columbia and Ministry of Aboriginal Affairs, Spring 1992
- Legal advisor, on the impact of hydro-electric development on Aboriginal and treaty rights in northern Ontario, Moose River/James Bay Coalition, Spring 1991
- Legal advisor, on human rights reform, Ontario Human Rights Reform Group, Summer 1991
- Legal advisor, on labour law reform, Task Force on Labour Law Reform in Ontario, Government of Ontario, Summer 1991
- Legal advisor, on social rights and constitutional reform, Ontario Social and Economic Rights Reform Group, Summer 1991
- Legal advisor, on constitutionality of Aboriginal justice systems, Task Force on Aboriginal Peoples and Criminal Justice, Law Reform Commission of Canada, Spring 1991
- Legal advisor, on social rights and constitutional reform, Executive and Constitutional Committees of the African National Congress, Summer 1990